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No._____

IN THE

Supreme Court of the United States

October Term, 1971

KINNEAR-WEED CORPORATION, *Petitioner*,

v.

HUMBLE OIL AND REFINING COMPANY,
A Texas Corporation (now dissolved and merged into Standard Oil Company, a New Jersey Corporation, its successor and/or surviving corporation) and its assigns,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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and its assigns,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court of The United States, and to the Honorable Justices of Said Court:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States District Court for The Southern District of Texas, entered in the Above-entitled case on November 9, 1969, and, review of the judgment of the United States Court of Appeals for the Fifth Circuit, entered July 7, 1971.

CITATION TO OPINIONS BELOW

The *en banc* opinion of the Court of Appeals in Appeal No. 16,780 (the appeal number assigned PETITION in Independent Action of Petitioner and being the original appeal number assigned in the original case tried in the District Court For The Eastern District of Texas beginning Feb. 28, 1955 and ending April 1, 1955) which *en banc* opinion was entered October 15, 1968, printed in the Appendix B-1 hereto, infra, p. 93, is reported in 403 F.2d 437. There is no written opinion of the District Court For The Southern District of Texas to act as Special Master or District Judge to hear said Independent Action assigned by *en banc* opinion 403 F.2d 437, however, said District Court recommended JUDGMENT TO BE ENTERED at end of its Findings of Fact and Conclusions of Law as Special Master filed September 5, 1969, printed in Appendix B-2 hereto, infra, p. 108, is reported in ____ F.Supp. ____. The final judgment of the District Court below in Misc. 68-H-40 entered November 12, 1969, printed in Appendix B-3 hereto, infra, p. 109. The opinion of the Court of Appeals dated April 26, 1971, printed in the Appendix B-4 hereto, infra, p. 112, is reported in ____ F.2d ____.

JURISDICTION

The judgment of the Court of Appeals dated April 26, 1971, entered July 7, 1971, printed in the Appendix B-5 hereto, infra, p. 124. Rehearing by the Court of Appeals denied on June 17, 1971, printed in Appendix B-6 hereto, infra, p. 126. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I

Whether Judge Lamar Cecil in the original case C. A. No. 2363 in the United States District Court For The Eastern District of Texas erred in refusing to grant "trial by jury" written demand therefor having been timely made and filed within 10 days from date of serving the last pleading of Petitioner-plaintiff in accordance with Rule 38 of Federal Rules of Civil Procedure and 7th Amendment of U. S. Constitution.

II

Whether the Court below erred in denying the relief requested in Petitioner's PETITION filed May 18, 1967 in form of Independent Action for disqualification of Judge Lamar Cecil,[1] and, for fraud upon the court and upon petitioner-plaintiff.

III

Whether the Court below erred in failing to conclude that Judge Lamar Cecil was disqualified as a matter of law under the provisions of 28 U.S.C. 455[2] from presiding as trial judge in C. A. 2363[3] because of his rela-

---

1. Judge Lamar Cecil was the United States District Judge for the Eastern District of Texas, Beaumont Division. Judge Cecil died on February 14, 1958.

2. 28 U.S.C. 455. "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

3. The original action between the parties hereto was filed in the United States District Court for the Eastern District of Texas, Beaumont Division, on April 6, 1953, and styled *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, C. A. 2363. This litigation for the purpose of brevity is referred to in this Brief as "C. A. 2363".

tionship to, and connection with, the defendant therein (respondent herein).

IV

Whether the Court below erred in failing to conclude that Judge Lamar Cecil was disqualified as a matter of law under the provisions of 28 U.S.C. 455 from presiding as trial judge in C. A. 2363 because of his relationship to, and connection with the attorneys for defendant therein (respondent herein).

V

Whether the Court below erred in failing to conclude that Judge Lamar Cecil was disqualified as a matter of law under the provisions of 28 U.S.C. 455 from presiding as trial judge in C. A. 2363 because of his "substantial interest" in the disposition of that case.

VI

Whether the Court below erred in failing to conclude that Judge Lamar Cecil was disqualified as a matter of law under the provisions of 28 U.S.C. 455 from presiding as trial judge in C. A. 2363 as a result of the cumulative effect of "substantial interest", relations to and connections with defendant and its attorneys set forth in questions III, IV and V above.

VII

Whether the Court below erred in concluding that Judge Lamar Cecil had properly exercised his discretion under the provisions of 28 U.S.C. 455 and legally sat as trial judge in C. A. 2363 in disregard of his relations

to and connections with the defendant therein and its attorneys and his interest in the outcome of that case.

VIII

Whether the Court below erred in failing to conclude that Judge Lamar Cecil, in forming his opinion in accordance with the provisions of 28 U.S.C. 455 on the propriety of his sitting as trial judge in C. A. 2363 owed a duty to make full disclosure in open court to the parties of his relations to and connections with the defendant and his interest in the outcome of the litigation, and that his failure to so disclose violates the provisions of that Statute.

IX

Whether the Court below erred in failing to conclude that the law imposes a duty upon party defendant, having knowledge to exclusion of party plaintiff, to disclose to party plaintiff and call to the attention of the Court any and all relations to or connections with party defendant and the Court which might be relevant to the formation of an opinion of qualification of the judge of said court under 28 U.S.C. 455.

X

Whether the Court below erred in failing to conclude that defendant's failure to investigate and disclose interests, all relations to and connections with Judge Cecil once the question of disqualification arose amounted to fraud upon the trial court, the court of appeals and the United States Supreme Court.

XI

Whether the Court below erred in failing to conclude that the law imposes a duty upon party defendant having

knowledge to exclusion of party plaintiff, to disclose to party plaintiff and call to the attention of the Court any and all interests, relations to or connections of trial judge with party defendant before trial proceeds amounts to fraud upon party plaintiff by party defendant.

XII

Whether the Court below erred in failing to conclude that the law imposes a duty upon party defendant and the trial judge having knowledge to exclusion of party plaintiff, to disclose to party plaintiff any and all interests, relations to or connections with said trial judge and party defendant have with each other before the trial proceeds, amounts to fraud and conspiracy to practice fraud upon party plaintiff by party defendant and said trial judge.

XIII

Whether the Court below erred in failing to hold the Statute 28 U.S.C. 455[4] void and invalid as being indefinite and uncertain as to meaning by not defining the term "substantial interest" with definite and certain meaning as such term is used in said Statute by which a justice or judge may determine his disqualification.

XIV

Whether the Court below erred in awarding to the respondent against plaintiff costs, expenses, including attorney's fees, expert witness fees and related matters on

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4. 28 U.S.C. 455. "Any justice or judge of the United States shall disqualify himself in any case in which he has a *substantial interest*, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein."

the question of exhibit D-31,[5] as Judge Connally willfully and with great prejudice recommended JUDGMENT TO BE ENTERED as Special Master and later entered as judgment by him as District Judge based on the reason by Judge Connally that this charge was asserted fraudulently from its inception by plaintiff, although no pleading or proof of fraud was made or asserted against plaintiff by defendant as to exhibit D-31.

XV

Whether the Courts below erred in failing to conclude that the employees of Respondent and Hughes Tool Co. acted in concert and gave false testimony in 1955 in C. A. No. 2363 before Judge Cecil and before Judge Connally in 1969 in Misc. 68-H-40 in the district court below that exhibit D-31 was made from Brown & Sharpe Mfg. Co. of Providence R. I. in 1910-1912 era for Sharp-Hughes Tool Co. of Houston, Texas predecessor to Hughes Tool Co. of Houston, Texas and thereby practiced fraud and conspired to practice fraud upon Petitioner-plaintiff and upon the district courts and court of appeals below.

XVI

Whether the Court below erred in refusing to receive and consider newly discovered evidence on D-31 presented within 3 days of discovery thereof to the Court of Appeals by Petitioner-Appellant on June 16, 1971 by the affidavit of Eddie R. Kehrer, a credible person having retired in 1959 as Head of all Machine Operations of the Mobil

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5. Exhibit D-31 is a defendant's exhibit number assigned in original trial C. A. No. 2363 to a 1910 or 1912 Hughes Tool Co., 3-cone bit which defendant introduced into evidence as a "jet drill bit" upon which Judge Cecil invalidated the Kinnear Patents in infringement suit. Defendant also defended D-31 as an authentic and genuine bit before Judge Connally in the district court below.

Oil Co., plant at Beaumont, Texas, a former supervisor of making of all 2 and 3 cone bits for Sharp-Hughes Tool Co. and its predecessor Hughes Tool Co., from Brown & Sharpe Mfg. Co. drawings from 1909-1918 which affidavit conclusively shows with attached Brown & Sharp Mfg. Co. drawing of January 6, 1909 that 3 cone bits of Sharp-Hughes Tool Co. in 1910-1912 were made with the water courses therein to direct drilling mud to hit on top of cones the same as shown in Howard R. Hughes U. S. Patent 959,540 for "ROLLER DRILLER", Application filed March 27, 1909, and issued May 31, 1910, and, that the 3 cone bit D-31 was not made in 1910-1912 era and that D-31 is a fraudulent bit upon which Respondent has won a fraudulent and unenforceable judgment in the federal courts.

CONSTITUTION AND STATUTES INVOLVED

The "due process of law" provision of the Fifth Amendment to the U. S. Constitution, printed in Appendix A-1 hereto, infra, p. 91. The "right of trial by jury in suits at common law where the value in controversy shall exceed twenty dollars" provision of the Seventh Amendment to the U. S. Constitution, printed in Appendix A-2 hereto, infra, p. 91. The statutory provision, 28 U.S.C. Federal Rules of Civil Procedure, Rule 38, printed in Appendix A-3 hereto, infra, p. 91. The statutory provision, 28 U.S.C. Section 455, printed in Appendix A-4, infra, p. 92.

STATEMENT OF THE CASE

Nature of the Case, Proceedings Below and Disposition

This proceeding is an action by the appellant seeking a new trial in C. A. 2363 in the United States District

Court for the Eastern District of Texas, which came to trial in that court in March of 1955 before Federal District Judge Lamar Cecil, now deceased. The grounds therefor, asserted by appellant, are the judicial disqualification of Judge Cecil and fraud perpetrated by appellee (hereinafter "Humble") on the United States District Court for the Eastern District of Texas, this Court, the Supreme Court, and the appellant. In this proceeding the appellant also seeks damages as a result of the fraud.

This appeal is from a judgment entered in Misc. No. 68-H-40 on November 12, 1969, by the United States District Court for the Southern District of Texas (A. 903). The judgment in the Court below denied appellant all relief sought in its original petition filed in the Court of Appeals for the Fifth Circuit on May 18, 1967, in Appeal No. 16,780, taxed certain costs, attorney's fees and expenses against the appellant, and enjoined the appellant and its attorneys from further raising the issues therein presented in any further litigation in any court.

The original action from which this proceeding derives was C. A. 2363 filed by the Kinnear-Weed Corporation, the appellant here, against Humble alleging patent infringement, unfair competition, and anti-trust violations. The case was heard before Judge Lamar Cecil, without a jury, and judgment was entered in favor of the defendant, Humble on October 10, 1956.[6]

The judgment in C. A. 2363 was affirmed by the Court of Appeals with some modification,[7] and both the first and second motions for rehearing were denied. A petition for certiorari to the Supreme Court of the United

6. 150 F.Supp. 143.

7. 259 F.2d 398; 266 F.2d 352; 296 F.2d 215.

States was then denied,[8] and a petition for rehearing on the denial of certiorari was lodged in the Supreme Court but never ordered filed.

A number of motions to reopen the case were filed in both the Court of Appeals and the Supreme Court, and several independent actions were filed in the United States District Courts for the District of Columbia and Southern District of Texas to set aside the judgment in C. A. 2363 based upon allegations of fraud and judicial disqualification.

Two of the independent actions now numbered 63-H-509 and 64-H-354 in the United States District Court fc the Southern District of Texas were consolidated, and set for trial on the merits when the appellant filed its Petition in the Court of Appeals on May 18, 1967, in Appeal No. 16,780, asking for relief from the judgment in C. A. 2363.

A hearing was had on that Petition before a three-judge panel of the Court of Appeals and subsequently an *en banc* panel of this Court. On October 15, 1968, an opinion was filed in Appeal No. 16,780 by the *en banc* Court,[9] which referred the action to the United States District Court for the Southern District of Texas so that a full and complete factual determination of the issues raised could be reached.

In accordance with the order of the Court of Appeals, a trial was then had before the Honorable Ben C. Connally, Chief Judge of the United States District Court for the Southern District of Texas. In his Findings of Fact and Conclusions of Law, filed on September 5, 1969, in Misc. No. 68-H-40 (A. 819).

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8. 361 U.S. 903, 80 S.Ct. 210, 4 L.Ed.2d 158.

9. 403 F.2d 437.

Judge Connally noted that he considered his findings and conclusions to be those of a Special Master, under referral of the Court of Appeals (A. 819). The proposed and final judgment denied plaintiff the relief sought, dismissing the action at plaintiff's costs, taxed all costs, attorney's and witness fees associated with the investigation of the original trial Exhibit D-31 against the plaintiff, and enjoined the plaintiff, its officers, directors and attorneys from further raising in any Court the issues presented in that proceeding.

Finally, the Court of Appeals, *en blanc,* by Order dated October 1, 1969, ordered the formal entry of Judge Connally's Findings of Fact and Conclusions of Law and directed the District Court to enter an appropriate judgment thereon (A. 856).

STATEMENT OF FACTS

As this Court can see from the Statement of Issues Presented for Review, the principal thrust of this appeal is that the facts adduced in the Record below make it clear beyond doubt that Judge Lamar Cecil was disqualified as a matter of law to sit as trial judge in C. A. 2363. Inherent in this argument is that Judge Cecil grossly abused his discretion in forming an opinion, under 28 U.S.C. 455, that he was qualified to sit as trial judge in C. A. 2363, in light of his relationship and connection with Humble and its attorneys and his obvious interest in the outcome of that litigation.

In the Court below the evidence relating to Judge Cecil's qualification was categorized under abbreviated titles for ease of reference by the court and parties. With the desire to facilitate this Court's review and consideration of the facts hereinafter set forth, those categories will be used. They are as follows:

1. Coastal Tool Company
2. The *Beck* Case
3. Sabine Tram Lands and Other Lease Interests
4. The Cecils' interests in Other Oil and Gas Companies
5. Humble Stock
6. Judge Cecil's Use of "Jet Bits"

Certain of these categories represent Judge Cecil's relationship and connection with Humble and its attorneys and others represent Judge Cecil's interest in the outcome of the litigation, C. A. 2363. The application of these categories will be discussed under the section of this brief designated "Argument".

Following these categories, there are set out, at No. 7, facts relating to appellee's fraud on the Federal Courts and the appellant. Facts relating to the issue known as "Exhibit D-31" will, with the Court's indulgence, be set out in the Section III of the argument.

For use by the Court, a copy of all of the docket entries in C. A. 2363 has been made a part of the Appendix (A. 940-53). However, for ready reference by the Court there is hereafter stated, an abbreviated chronology of cetrain principal events which will be useful to the Court in evaluating the significance of the facts relating to Judge Cecil's relationship, connection, and interest in respect of his actions in C. A. 2363:

April 6, 1953	Complaint filed.
September 9, 1954	Lamar Cecil confirmed as Federal Judge.
January 17, 1955	Judge Cecil made ruling denying plaintiff's motion for trial by jury of Jan.14, 1955.

February 28, 1955	Trial commenced in C. A. 2363 and trial lasted approximately one month.
October 10, 1956	Final judgment signed by Judge Cecil.
January 7, 1957	Order signed by Judge Cecil denying plaintiff's motion for new trial and other relief.

Of course, after Judge Cecil assumed jurisdiction of C.A. 2363, he entered a number of orders relating to discovery and other pretrial matters affecting the rights of the litigants.

He also entered a number of post-trial orders between the termination of the trial and entry of his judgment. All of these actions are reflected in the docket entries. (P's Tr. Ex. #2), (A. 940-53).

1. Coastal Tool Company

The findings are set out in the Appendix, pp. 949 entry 94), and are herein summarized in pertinent part.

Coastal Tool Company, Inc. was a corporation organized in 1937 engaged in the business of maintenance and repair of oil field equipment in and around Beaumont, Texas.

Almost from its inception it did business with a number of major oil companies, including Humble Oil & Refining Company. One Mr. Schultz was the moving party in the corporation and controlling stockholder at all material times.

Some time in 1945 Judge Cecil purchased a 25% stock interest in Coastal Tool Company, Inc. for $7,000.-

00. Shortly thereafter he was named secretary-treasurer of the corporation and a director, and his law firm represtend the company. Following his appointment to the Bench in 1954, Judge Cecil continued his connection with Coastal Tool Company, Inc. as a stockholder, and director until his death in 1958. After going on the Bench, Judge Cecil no longer acted as attorney for the corporation but his former law firm did so act.

From the record in this case, it appears that the Judge's contacts with the company were minimal. The salary paid to him was not so much as compensation for services as it was a means of passing on to him as a stockholder, earnings of the company other than dividends.

The following table shows payments to Judge Cecil by Coastal Tool Company, Inc. in salary, dividends and director's fees from 1945 until his death in 1958:

Year	Salary	Dividends	Director's Fees	Total
1945	$2,400.00			$2,400.00
1946	2,400.00			2,400.00
1947	2,400.00			2,400.00
1948	2,400.00			2,400.00
1949	2,400.00			2,400.00
1950	2,400.00			2,400.00
1951	3,000.00	$5,500.00		8,500.00
1952	3,135.00	3,750.00	$300.00	7,185.00
1953	3,180.00	3,750.00	600.00	7,530.00
1954	3,180.00	3,750.00	550.00	7,480.00
1955	3,180.00	3,750.00	600.00	7,530.00
1956	3,445.00	3,750.00	600.00	7,795.00
1957	3,445.00	2,500.00	600.00	6,545.00
1958	265.00		50.00	315.00

(Judge Cecil died February 14, 1958)

Humble was a major customer of Coastal Tool Company, Inc. from 1938 until Coastal was dissolved in 1969. The following table shows the total business done by Coastal in the years 1952 through 1958, the amount of that business attributable to Humble's business, and the percentage that Humble's dollar business represented of the total business:

Year	Coastal's total business	Humble's business	Percentage
1952	$263,367.01	$51,958.03	19%
1953	226,472.26	51,614.06	22%
1954	203,857.50	42,668.53	21%
1955	202,599.93	29,400.22	14%
1956	243,534.57	22,254.70	9%
1957	207,218.79	25,276.60	12%
1958	132,931.77	15,398.83	11%

The Court below specifically found that Judge Cecil, during the period of the pendency of C. A. 2363 in his court, was aware that Humble was a customer of Coastal (A. 833(8)). Additionally, Humble had formal notice during those years that Judge Cecil was an officer and director of Coastal. This is shown by the existence of an affidavit in Humble's files bearing date of January 24, 1955 (Ex. Knauth Dep., Vol. I-P's Tr. Ex. #10A), (A. 318) submitted by Coastal at Humble's request, listing all of the officers and stockholders of Coastal. It is stated by Humble that such an affidavit was requested from its service companies so that Humble could determine whether any of its employees were stockholders of such service companies. It should be noted, however, that Humble was unable to produce any similar affidavit from Coastal for other years, and that the affidavit produced was dated January 24, 1955, only 35 days prior to the commencement of trial in C. A. 2363.

Judge Connally made his Findings of Fact in CA. 68-H-40 relating to Coastal Tool Company, Inc., pages 16-18, paragraphs (2), (3) and (4), page 18, paragraphs (7) and (8).

(Plaintiff's Trial Exhibit 122, Interrogatory No. 32 and answer thereto, page 24, lines 4-14) which clearly state that Judge Cecil told Vratis at lines 13 and 14:

> "* * * Humble, and others, who were doing business with Coastal Tool Co."

Also, the fact that Judge Cecil was the Secretary-Treasurer of Coastal and its lawyer (Lawson Deposition, Vol. 1, Plaintiff's Trial Exhibit 8A, p. 8-9, Ex. 1, p. 38). Cecil advised Coastal in his letter of October 28, 1952, addressed to Coastal and signed by Cecil, Keith & Mehaffy (Lawson Deposition, Vol. 2, Plaintiff's Trial Brief Exhibit 8B, p. 70 that Coastal was authorized under G.O.R.-14 Interpretation No. 2, that Coastal could raise its rates. This letter was contained in Humble's files and therefore, must have been transmitted by Coastal to Humble, or, otherwise, how would it be in Humble's files with other papers produced by Humble's Mr. Knauth its retired Field Superintendent (Knauth Dep. Vol. 1, Plaintiff's Trial Exhibit 10A, p. 17, Ex. 2) quoted in October 28, 1952, letter in said file, Ex. 2.

Additional facts elicited by Plaintiff-Appellant before Judge Connally in Misc. No. 68-H-40 in the Coastal Tool Company matter, establishes the facts that Humble terminated in the latter part of 1952, the Continuing Contract No. 25 (AW.) File 5-3 (Knauth Dep. Vol. No. 1, Trial Ex. 10A, p. 17, Ex. 2) that Humble had with Coastal for many years (Lawson Dep. Vol. No. 2, Tr.

Ex. 8B, pp. 35, 36, 56, 57, 67, 68 and 70; Knauth Dep. Vol. Nc. 1, Trial Ex. No. 10A, p. 15, 17, Ex. 2).

That thereafter, in 1952, Humble required month to month contracts with I. H. Lawson signed for Coastal in order to keep up business relations in order to be able to do business with Humble (Lawson Deposition, Vols. No. 1 and 2, Plaintiff's Exhibit 8A, 8B, pp. 51, 52, 53 and 68). This cancellation was made upon sending new rate schedules to Humble after October 28, 1952, the date of the advisory letter of Cecil, Keith & Mehaffy to Coastal Tool Company, (Lawson Deposition Vol. No. 1, Plaintiff's Trial Exhibit 8A, p. 8-9, Exhibit 1, p. 67) advising Coastal is an organization engaged in oil field operations and that Coastal is exempt so that it can raise its prices for services for oil repair and service work under Price Stabilization Authority G.O.R.-14, Interpretation No. 2 (Lawson Deposition Vol. 2, Plaintiff's Trial Exhibit 8B, p. 57, lines 13-19).

The above record of the long standing Continuing Contract of Coastal with Humble giving blanket authority for any Humble District Production Superintendent or Supervisor to requisition, contract for, purchase and use the goods, services and material from any such contract holder. Coastal had such a contract from 1945-1952 (Knauth Deposition No., Plaintiff's Trial Exhibit 10A, p. 17, part of Humble File Exhibit 2). Coastal holding such a Continuing Contract was immediately terminated by Humble when Humble was notified of the increase schedule of prices of Coastal after the October 28, 1952 letter signed by Cecil, Keith & Mehaffy. Thereafter, Coastal had to sign new contracts each month as testimony of I. H. Lawson, Secretary-Treasurer of Coastal to obtain Humble's patronage. Cecil, Keith & Mehaffy,

counsel for Coastal created this situation by its advice letter of October 28, 1952, to Coastal. Coastal followed such advice and notified Humble of its increase in Schedule of price raises for its goods, services and materials (Lawson Deposition Vol. 2, Trial Exhibit 8B, page 57, lines 13-19). To give such legal advice by Cecil, Keith & Mehaffy to Coastal, Lamar Cecil its counsel and secretary (Lawson Deposition Vol. 1, Plaintiff's Trial Exhibit 8A, p. 8, Ex-1, p. 38) knew the situation and advised such course of action with Humble and all customers of Coastal. After the termination of the Continuing Contract Coastal then month to month had to beg the alms of Humble for its business. It must be remembered that Humble was one of the, if not the largest single customer of Coastal. Cecil had a stake in this deal both as a stockholder and acting counsel for Coastal that created this confrontation between Coastal and Humble. It is obvious how keenly aware Cecil and Coastal coveted the business of Humble to go back month after month from October 28, 1952, thereafter, until it finally sold out its equipment at auction sale in March 25, 1969, and went out of business.

During the time while Lamar Cecil was Coastal's attorney and after he became Judge on September 9, 1954, and up thru the time of his death on February 14, 1958, Judge Cecil enjoyed the income thru Coastal from Humble's business under such circumstances of Coastal having to sign month to month contract to get this business. Judge Cecil as such from September 9, 1954, thru date of his death, February 14, 1958, received salary of $200.00 to $265.00, per month as Vice-President of Coastal, $3,000.00 to $3,750.00, per year as his one-fourth of cash stock dividends by reason of his one-fourth stock ownership in Coastal and $600.00 per year as Director's fee of Coastal all of which resulted in some $7,200.00 to

$7,800.00, per year increase for Judge Cecil. Humble's business averaged around 16.1% or approximately one-sixth of this total income paid to Judge Cecil during the 1952-1958 period.

This approximately one-sixth of the total business attributable directly to Humble's patronage during the period of 1952-1958 was such an interest as to weigh heavily on the mind of Judge Cecil and any further displeasure of Coastal to Humble Cecil knew would bring swift reprisal from Humble should Judge Cecil make a decision in C.A. 2363 against Humble and for Kinnear-Weed. An unfavorable judgment against Humble would cause Humble to drop Coastal from any further business. This is the built-in reputation of Humble as evidenced by its quick prior reprisal action against Coastal such as Humble's action in terminating the cherished Continuing Contract of Coastal. With such a delicate state of the connections and relationships existing between Coastal and Humble, it was a direct pecuniary gain for Coastal and Judge Cecil as long as Coastal or Judge Cecil did not create Humble's displeasure but Coastal had to placate Humble from month to month for the privilege of satisfying Humble to get their business and the expectation of obtaining future business.

This is and was an unhealthy climate for Judge Cecil to be continually reminded of and confronted with, and denied Kinnear-Weed, "due process" under the Fifth Amendment to the United States Constitution. It will also be remembered that Judge Cecil denied timely "Jury Demand" of Kinnear-Weed after serving of last pleading of said appellant on January 14, 1955, and denied by Judge Cecil on January 17, 1955, the date set for initial trial of C.A. 2363. This delimma which faced Judge Cecil was a relationship and a "connection with" situation to cause violation of the requirement under 28 U.S.C.,

Sec. 455, and further, it was a "fraud" practiced upon appellant and all of the Federal District Courts, the Fifth Circuit Court of Appeals and U. S. Supreme Court, both by Judge Cecil and by Humble. To hold such a constant threat of reprisals against Judge Cecil, of which he was fully aware, who in this instance stood in the shoes of Coastal, denied plaintiff-appellant "due process of law" under the Fifth Amendment of the United States Constitution. Neither Judge Cecil nor Humble to this day have ever revealed to any Federal Court including the District Courts, this Court of Appeals and the United States Supreme Court, the above concealed connections and relations under 28 U.S.C. 455, but to the contrary have concealed such facts from said Courts.

Judge Cecil says:

> "We have recently discussed the proposed increase in prices which your company is making for services rendered by you in your oil field repair and service work * * *"

Further, I. H. Lawson, Secretary-Treasurer of Coastal states in Deposition testimony the following: (Lawson Deposition Vol. 2, Plaintiff's Trial Exhibit 8B, p. 11, lines 13-15)

> "Q. Did you have any conversations with Mr. Schultz about the possible loss of Humble as a customer?
> "A. Oh, we discussed it. . ."

(Lawson Deposition, Vol. 2, Plaintiff's Trial Exhibit 8B, p. 57, lines 13-19)

> "Q. Now getting back to this matter of the disputed increase when Humble cancelled the Continuing Contract, when that was being discussed and

corresponded about, did you ever discuss that matter with Mr. John B. Payne the District Superintendent for Humble?
"A. Yes. I think I talked to him about it.

(Lawson Deposition, Vol. 2, Plaintiff's Exhibit 8B, p. 36, line 25, p. 37, lines 1-4):

"Q. Now, did you consider it a serious matter that Humble would cancel its continuing contract with Coastal?
"A. Well sure. We would hate to lose their account."

(Lawson Deposition, Vol. 2, Plaintiff's Trial Exhibit 8B, P. 68, lines 5-13)

"Q. And they signed a new contract with you?
"A. Thirty days.
"Q. And that is a month to month type of contract?
"A. It was at that time.
"Q. When did they sign that contract with you?
"A. It was signed once a month.
"Q. When did you first start signing this contract?
"A. Oh, about the first thirty days after they had cancelled."

The statute 28 U.S.C. 455 says judge shall disqualify for interest and a Judge who has a stockholding interest in a third party (Coastal Tool Co. Inc.) which in turn does business with a party such as Humble in the C.A. 2363, does have an interest within the statute because it was the result to Judge Cecil's judgment in C.A. 2363, that is, he had something to gain by ruling in favor of Humble, he had probable expectations of loss of Humble's business with Coastal if he ruled against Humble in the particular case of KINNEAR-WEED v. HUMBLE CO.; C.A. 2363. Coastal through Cecil, Keith & Mehaffy

letter of October 28, 1952, ired Humble and they terminated the continuing contract. It was immediate and complete termination of the continuing contract of Coastal when Coastal raised the rates for its services under such contract. Humble held Coastal on a string like a puppet making Coastal come back and sign monthly contracts from and after October 28, 1952 letter found in Humble's files (Knauth Deposition, Vol. 1, Plaintiff's trial Exhibit 10A, p. 17, part of Exhibit 2,) until Coastal closed its doors on March 25, 1969. Humble had said October 28, 1952 letter in its current files (Knauth Exhibit No. 1, page 17, part of said Exhibit 2). Humble was Coastal's best dollar volume customer as pointed out above amounting an average of 16.1% of total business from 1952 through 1958, which business was directly attributable to Humble's patronage. Coastal's business hung in the balance and immediate result of the outcome of C.A. 2363 if Humble won a decision Humble would keep giving Coastal its business; if Humble lost, then Coastal and Judge Cecil as one-fourth stockholder in all probability, lost Humble's business. And when you consider that 16.1% average or approximately one-sixth of the total business of Coastal came from Humble in the 1952-1958 period and that Judge Cecil enjoyed these benefits amounting to approximately $7,200, to $7,800.00 per year during this 1952-1958 period. The one-sixth approximate business directly attributable to Humble's patronage which they did and could withdraw at will, was the margin of profit which made it possible for Judge Cecil and his friends as stockholders in Coastal to either gain handsome profits if Humble wins C.A. 2363. or very small or marginal profits if Humble loses C.A. 2363. Under these very definite set of circumstances Judge Cecil was in a dilemma, which must be considered a

swaying factor to make Humble win and keep these very high percentages of profits. As held in TUMEY v. OHIO (1927) from page 532 thereof:

> "Every procedure which would offer a possible temptation to the average man as a Judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

2. The *Beck* Case

The existence of the *Bryan D. Beck, et al vs. Humble Oil & Refining Company* case, did not come to the attention of the appellant until on or about February of 1966 when C. W. Kinnear, President of the appellant corporation, received word of its existence. In an affidavit, (P's Tr. Ex. #33), (A. 998), Mr. Kinnear details how he attempted to locate the court records on that case in the 75th Judicial District Court of Texas. The court records had been removed from the office of the clerk of that court and the file only disclosed that one Frank Turner, now deceased, had removed those files. After many days of research and travel, Mr. Kinnear located these files and they are now a part of the record in this case (P's Tr. Ex. #32A, B & C), (A. 1094-1101).

The court records in the *Beck* case reflect that in June of 1953, Bryan D. Beck, Judge Lamar Cecil and his brother-in-law, Randolph Reed, and others, as plaintiff lessors, filed a suit against Humble as their lessee of certain land in Chambers County, Texas. The petition, as amended, and upon which the matter proceeded to trial, demanded judgment in the amount of $306,771.08, and basically alleged that the defendant Humble was indebted to the plaintiffs for its failure to properly de-

velop leases and for oil and gas drainage (P's Tr. Ex. #32A), (A. 1094-1101). The proceedings in the *Beck* case are substantially summarized by the lower court on pp. 19 through 23 of its Findings of Fact and Conclusions of Law (A. 819).

In essence, the case went to trial in February of 1954 and lasted one month. It was vigorously prosecuted by both the plaintiffs and the defendant Humble. The trial resulted in a hung jury. The case was set for retrial in January of 1955. The principal attorney for plaintiffs was one John H. Benckenstein (Rec., p. 1375). Lamar Cecil, then a practicing attorney in Beaumont, Texas, actively participated as plaintiff's attorney for one day during the trial, in Mr. Benckenstein's absence (Rec., p. 1377). The defendant Humble was represented throughout the entire case in each day of trial by Mr. Walter Morgan of Humble's legal department (A. 419; Dep. of Walter Morgan, P's Tr. Ex. #18, p. 8, L. 22-24), and he, at that time, for the purpose of that case, was under the direct supervision of Mr. Nelson Jones, also of Humble's legal department (Dep. of Nelson Jones - P's Tr. Ex. #27) (A. 306). In all likelihood, Mr. Morgan discussed the Beck case with Mr. Jones (Dep. Jones - P's Ex. #21, p. 32, L. 4-13; p. 34, L. 4-10) (A. 306), (A. 881); (Dep. Morgan - P's Tr. Ex. #18, p. 13, L. 4), (A. 419).

Some weeks after the hung jury verdict in the *Beck* case, someone contacted Mr. Morgan, advising that Mr. Beck, Mr. Reed and Lamar Cecil would like to meet with him to discuss a settlement of that case (Dep. Morgan - P's Tr. Ex. #18, p. 16, L. 21, 25; p. 17, L. 1-13) (A. 419). Thereafter, on or about July 7, 1954, Mr. Morgan met with Messrs. Beck and Reed, but without Lamar

Cecil in attendance (Dep. Walter Morgan - P's Tr. Ex. #18, p, 17). The plaintiffs' attorney, Mr. Benckenstein, was not at that July meeting and it appears that Mr. Benckenstein did not have knowledge that the meeting had taken place until some time thereafter (Dep. Morgan - P's Tr. Ex. #18, pp. 22-24 (A. 419); Dep. Benckenstein — P's Tr. Ex. #19, Dep. Ex. #4), (A. 235).

As a result of that meeting and as reflected in a series of correspondence between Mr. Benckenstein and Mr. Morgan (Dep. Benckenstein - P's Ex. #19, Dep. Ex. 4-9, (A. 235-249)), plaintiffs made an offer to settle the case with Humble in the amount of $11,993.80. The letter containing the offer dated October 2, 1954, itemized certain expenses to be included in the offer of settlement amount, one of which was an attorney's fee for Lamar Cecil in the amount of $1,250.00 (A. 240-1). Thereafter, without explanation, Mr. Benckenstein wrote Mr. Morgan on October 4, 1954, stating ". . . that the fees of Mr. Lamar Cecil should have been $250.00 and not $1,250.00. . . ." (A. 243). Mr. Morgan subtracted the $1,000.00 reduction in attorney's fees from the offered settlement figure and then divided the resulting sum in half, arriving at a tentative settlement figure of $5,496.90 (Dep. Morgan - P's Tr. Ex. #18, p. 25, L. 12-25; p. 26, L. 1-4), (A. 241). The apparent ultimate settlement figure represented by the settlement check issued by Humble was $5,192.60 (P's Tr. Ex. #22), (A. 967). The agreement of settlement signed by the plaintiffs, including Judge Lamar Cecil, was dated January 31, 1955 (Petitioner's Folder of Exhibits, Ex. #12), (A. 962), and the settlement check was dated February 16, 1955. It is alleged that Judge Cecil received $409.24 as his proportionate share of the settlement figure. The settlement check was apparently divided in the same ratios as the plaintiffs' in-

terests in the lease (A. 967). It should be noted that Judge Cecil was indicated to receive all copies of Mr. Benckenstein's settlement correspondence directed to Mr. Walter Morgan.

Mr. Morgan, the Humble attorney who handled the trial of the *Beck* case and the settlement negotiations of the *Beck* case through February 21, 1955, also entered an appearance in C.A. 2363 as an attorney for Humble, along with his superior Mr. Nelson Jones within days after the suit was filed on April 6, 1953 (Dep. Morgan - P's Tr. Ex.#18, p. 23), (A. 419). Mr. Morgan also participated at court before Judge Lamar Cecil on certain pretrial matters in C. A. 2363, while at the same time settlement negotiations were continuing in the *Beck* case (Dep. Morgan - P's Tr. Ex. #18, p. 35), (A. 419). At no time did Mr. Morgan ever advise the appellant of the existence of the *Beck* case nor was the *Beck* case ever mentioned in court in front of Judge Lamar Cecil (Dep. Morgan - P's Tr. Ex. #18, p. 38, L. 16-20), (A. 419). Mr. Morgan recalls that he was aware of the existence of the *Beck* case and the settlement negotiations therein while he actively participated as Humble's attorney in C.A. 2363 (Dep. Walter Morgan - P's Tr. Ex. #18, p. 35, L. 16-20), (A. 419).

Thus active settlement negotiations in the *Beck* case continued to take place up until delivery of the check on February 21, 1955, just seven days prior to the commencement of trial in C.A. 2363.

In the BECK, ET AL case No. 3988, according to Exhibit "A" attached to First Amended Answer of Defendant, Humble paid to Lamar Cecil as a direct result of the filing of the Beck suit. A lump sum "*Back pay on oil production from Frio I sand*" from Humble well in

E.H.R. Wallis Survey, Chambers County, Texas, as oil royalty from September 1, 1950, through March 1, 1953, the sum of $912.37, and *"back pay on gas royalty"* for same period in the sum of $184.40, aggregating $1,-096.77. Footnote at bottom of Exhibit "A" states Humble continued to pay monthly royalty payments to Judge Cecil after January 1, 1953, up until Frio I sand quit producing which was in the first part of 1962 in accordance with Humble sworn Production Reports filed with Railroad Commission of Texas attached to December 1, 1969 "Petitioner's Supplemental Reply to Response to Petition to Vacate". This netted Judge Cecil a gain of $850.00, or more per year (as per Cecil's income tax returns, Plaintiff's Trial Exhibit 133) for an additional 8 years or the sum of $6,500.00. These payments were a direct result of said suit. Here is proof that Humble paid Judge Cecil over $7,500.00 in oil and gas royalities from January 1, 1953, thru December 31, 1961. Plus, paying him as an adversary attorney either $1,250.00 or $250.00 as an attorneys fee. Plus, the payment of Judge Cecil and his co-plaintiff's *"obligations"* such as geological fees, travel expenses, other associate attorneys fees C.B. Cain, costs of suit, et cetera, in the final settlement of the BECK litigation paid by Humble check No. E95009, dated February 16, 1955 (Plaintiff's Trial Exhibit 32C) made in the sum of $5,192.60, and deposited to the account of Bryan D. Beck, Jr., in the First National Bank of Beaumont, Texas. Cecil deposited $409.24 check of Beck in disbursement of the $5,192.60 Humble check on April 14, 1955 some 2 weeks after the conclusion of C.A. 2363, although he received same March 7, 1955 (Beck Deposition, Plaintiff's Trial Exhibit 17, p. 14, 17-19).

In making the final settlement in the Beck case, Humble's attorney Walter B. Morgan prepared *"Motion to Dis-*

miss" the Beck case at Plaintiff's costs (Plaintiff's Trial Exhibit 32C). The following is direct quotations from the Motion to Dismiss filed by John H. Benckenstein, attorney for Beck, Cecil, et al, to-wit:

> "Now comes the plaintiffs Bryan D. Beck, Jr., Lamar Cecil etc. * * *, and inform the Court that they are of the opinion that facts unknown to them prior to the first trial of this cause, but learned by them during the trial, renders it useless for them to seek another trial hereof and plaintiffs hereby move the court that it enter a judgment that they take and recover nothing by this suit."

Since the Beck case was finally settled within less than two (2) weeks before the actual commencement of the original trial of KINNEAR-WEED v. HUMBLE; C.A. 2363, it is obvious that the said Motion to Dismiss filed February 2, 1955, was a cover-up to hide the true dealings, connections and relations between Humble and Judge Cecil and his co-plaintiffs. This concealment of the settlement in said Beck case by *untrue overt acts* on both the part of Humble and Judge Cecil and his co-plaintiffs was a planned fraudulent conspiracy between Humble and Judge Cecil et al, in the Beck case. It was based upon untrue facts to deceive all of the general public and particularly all of the Federal Courts including U.S. District Court for Eastern District of Texas, Court of Appeals for Fifth Circuit, The United States Supreme Court and Plaintiff-Appellant. The KINNEAR-WEED v. HUMBLE case No. 2363 was first set for trial on January 17 1955, and reset and tried on February 28, 1955, ending April 1, 1955.

The "*Order of Dismissal*" taxed all costs against Plaintiffs in the Beck case, although Humble paid $192.60, of

the $5,192.60 Humble check. Mr. Walter B. Morgan, attorney for Humble in Beck and Kinnear-Weed cases testified as follows (Rec. page 149) and admits:

> "Q. And you were aware, Mr. Morgan, of the basic gravaman of Judge Cecil's disqualification in the Kinnear case?
> "A. Yes."

John H. Benckenstein in his deposition testimony (Benckenstein Deposition No. 2, dated April 28, 1969, Plaintiff's Trial Exhibit No. 20, p. 11, lines 22-25; p. 12, lines 1-9) states that he received $2,500.00 attorneys fees in Beck case. Another obligation of Beck, Cecil, et al listed "*as expense*" in his letter of October 2, 1954, (Benckenstein Deposition No. 1, Plaintiff's Trial Exhibit No. 19) to Walter B. Morgan attorney for Humble in the Beck case, among other expense items listed the following:

> "The plaintiffs have invoices to substantiate the following *expenses* in this suit: (emphasis ours)
> John H. Benckenstein,
> attorney fees .....$ 2,500.00
> Lamar Cecil,
> attorney fees and expenses .....$ 1,250.00"

Why did Humble and Judge Cecil not disclose the above mentioned dealings, relations and connections with each other to Plaintiff-Appellant before the trial of C.A. 2363, and, did not disclose same until Plaintiff-Appellant unearthed such dealings, relations and connections by going to great expense in digging up this information piece by piece. Their concealment and overt acts of paying by Humble and receiving by Judge Cecil was a fraudulent conspiracy kept secret from plaintiff-appellant

and all Federal Courts involved when it was the duty of both Humble and Judge Cecil to have disclosed same in advance of trial of C.A. 2363. Failure to disclose when once the issue was raised, or in advance voluntarily by Humble and Judge Cecil, practiced a fraud and conspiracy to defraud said Federal Courts and Plaintiff-Appellant. *Shawkee Mfg. Co. v. Hartford Empire Co.*, 322 U.S. 271, 88 L.ed 1269 (1944) and *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 88 L.ed 1250 (1944). Also, failure to disclose all of this to the Federal Courts and Plaintiff-Appellant did not allow "a fair trial in a fair tribunal, In Re Murchison, 349 U.S. 133, 136; 99 L.ed. 942, 75 S.Ct. 623 (1955), which held:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532, 71 L.ed 749, 758, 47 S.Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance justice' Offut v. United States, 348 U.S. 11, 99 L.ed 11, 75 S.Ct. 11."

3. Sabine Tram Lands and Other Lease Interests

By Deed dated August 19, 1937, the Sabine Tram Company conveyed to Earl C. Hankamer approximately 80,000 acres of land located in Newton, Jasper, Liberty and Orange Counties, Texas, and Calcasieu Parish, Louisiana (P's Tr. Ex. #38, A. 910).

In the said Deed the Sabine Tram Company reserved unto itself a contingent payment of $500,000.00 to be paid out of 1/32nd of the first oil, gas or other minerals produced and saved from the lands (A. 910).

By Deed dated September 4, 1937, Earl C. Hankamer conveyed to T.S. Reed, Randolph C. Reed, Mrs. Lamar Cecil and Miss Ruby Reed[10] an undivided one-half part and interest in and to all of the overriding royalty and minerals in that land (A. 907-910). In this Deed from Hankamer to the Reeds and Mrs. Cecil, it is made clear that Mr. Hankamer, in purchasing the Sabine Tram Lands, was acting for himself to the extent of a one-half interest and for the above mentioned members of the T.S. Reed family to the extent of the other one-half interest.

As a result of the conveyance by Mr. Hankamer, the Reed family's interest, including Mrs. Lamar Cecil, amounted to approximately 38% of the mineral interest on the 80,000 acres of land. At that time Mrs. Lamar Cecil owned an undivided 9-1/2% of the mineral interests and rights under the 80,000 acres of land (A. 907-910).

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10. Mr. T. S. Reed, deceased, was Judge Lamar Cecil's father-in-law, Randolph C. Reed is Mrs. Cecil's brother, and Miss Ruby Reed (now Mrs. Ruby Reed Graham) is Mrs. Cecil's sister.

There is recorded in the County Court of Newton County, Texas, a release instrument which reflects that the $500,000.00 payment out of a 1/32nd mineral interest reserved by Sabine Tram Company in the Deed dated August 19, 1937, has been fully paid and discharged in December of 1964 (P's Tr. Ex. #37), (A. 995). This is evidence of the fact that the Sabine Tram Lands had produced 16 million dollars worth of minerals for the period of its purchase in 1937 to the date of the release in 1964.

For the period from the date of purchase of the Sabine Tram Lands in 1937 through December 1, 1960, Humble made ten separate leases on that property (Rec., p. 1380); P's Tr. Exs. #38 (A. 910-39) - #47 (A. 881)). The dates of these leases and acreage contained therein are as follows:

	Date of Lease	*Acreage*
1.	8/19/37	42,053
2.	8/19/37	147.6
3.	5/18/49	2,005
4.	1/25/52	4,727
5.	3/24/53	640
6.	10/20/54	2,337.7
7.	11/14/56	18,545
8.	3/12/57	4,320
9.	6/1/57	3,736
10.	4/13/60	1,763

In addition, 47 other leases were made on the Sabine Tram Lands after October 19, 1937 (A. 907); (P's Tr. Exs. #48 - #93).

On May 31, 1954, Mr. T. S. Reed conveyed his 9-1/2% interest in the Sabine Tram Lands to his three

children. Thereafter, Mrs. Cecil's interest in the Sabine Tram Lands amounted to 12-1/2% (A. 907-910); (P's Tr. Ex. #108), (A. 954).

Throughout this proceeding and in earlier proceedings there appears to have been some dispute as to whether Mrs. Cecil received her original interest from her father as a gift or otherwise. Appellant does not believe that it is of significant importance to this case to determine how Mrs. Cecil arrived at her ownership interest. Suffice it to say that Mrs. Cecil called her interest a "carried interest" (A. 100, 210), and explained that her father purchased a one-half interest with Mr. Hankamer and gave his children their interests. She states that thereafter the income earned by the individual interest of the three children was returned to the father in payment for the interest (Dep. Mrs. Cecil - P's Tr. Ex. #12, p. 34, L. 23; p. 35, L. 3), (A. 109). And she also states that each year her father advised her how to reflect the income on her income tax statement (Dep. Mrs. Cecil - P's Tr. Ex. #94, p. 37, L. 18-22), (A. 100).

Both Judge and Mrs. Cecil were aware of the Sabine Tram interest of Mrs. Cecil since their joint income tax returns, up until the time of Judge Cecil's death, always reflected the income therefrom (Dep. Mrs. Cecil - P's Tr. Ex. #12, Dep. Exs.), (A. 109). Additionally, both Judge and Mrs. Cecil were signatories to Humble leases 3 through 10 listed above, and to 34 of the 47 other leases executed on the Sabine Tram Lands (A. 907-910). For the years 1951 through 1963 Judge and/or Mrs. Cecil received income from the oil and gas industry as bonuses and royalties as lessors (not restricted to the Sabine Tram Lands) in the amounts indicated in the following schedule (A. 907-910):

Year	*Amount*
1951	$ 8,269.93
1952	9,071.05
1953	Not known
1954	20,199.05
1955	17,134.02
1956	55,045.84
1957	75,615.69
1958	24,956.84
1959	36,122.86
1960	35,592.28
1961	41,995.87
1962	31,740.58
1963	34,400.53

Included in the figures above stated, the following bonus and royalty payments were from Humble (A. 907-910) and principally from leases on the Sabine Tram Lands:[11]

Year	*Bonuses*	*Royalties*
1951		702.73
		582.08
1952		526.61
		583.28
1953	not computed	
1954		901.53
		851.79
1955		1,331.44
		865.88
1956	$ 3,528.45	1,114.36
		895.89
1957	8,219.42	665.36
	9,541.76	1,200.63
	8,238.78	

11. Judge Cecil received royalty income from Humble in the East Mays Field (the Humble lease which was the basis of the *Beck* case) and in the Amelia Field (see the appraisement of Judge Cecil's Estate (Petitioner's Folder of Exhibits, Ex. #3), (A. 201-08).

1958		1,036.85
		848.58
1959		886.80
		2,843.97
1960	5,590.60	884.76
1961		889.49
1962		1,519.34
1963	1,344.17	1,474.99

It is significant to note that no bonuses were received until the year 1956, the year in which judgment was entered on behalf of Humble in C. A. 2363. The following year, 1957, the Cecils received bonuses from Humble in the amount of $25,999.96. These bonuses were received by Mrs. Cecil from the exercise by Humble of certain shooting options and acreage selection under the November 14, 1956 lease. This lease was executed the month following the judgment in C. A. 2363 and the lease expired because Humble failed to pay delay rentals and no drilling was ever undertaken on the leased premises (P's. Tr. Ex. #44).

4. The Cecils' Interests in Other Oil and Gas Companies

Although the evidence in this record is clear and undisputed on this matter and taken directly from the Cecils' income tax returns for relevant years, the lower court failed to make any findings relating thereto or show any conclusions of law therefrom.

The following facts were taken from the joint income tax returns of Lamar and Mary Reed Cecil (P's Tr. Ex. #12 - Mrs. Cecil, Dep. Exs.), (A. 109) and the inventory and appraisement of the Estate of Judge Lamar Cecil (Petitioner's Folder of Exhibits, Ex. #3), (A. 201-08).

From the appraisement of Judge Cecil's estate, Judge Cecil, at the time of his death, owned stock interest in the following oil and gas companies during his lifetime, such stock having a value as indicated as of the time of his death:

Name of oil companies in which Judge Lamar Cecil owned stock:	Value of stock owned by Judge Lamar Cecil at the time of his death:
Standard Oil Company (N.J.)	$ 399.00
Standard Oil Co. of Indiana	3,625.00
El Paso Natural Gas Company	11,252.00
Tennessee Gas & Trans. Co.	14,850.00
Middle States Petroleum Co.	925.00
Equitable Gas Company	2,963.00
United Carbon	10,750.00
Total	$ 44,764.00

The following schedule reflects the dividends received by Judge Lamar Cecil for the period indicated on the stocks, reflected in the above schedule:

Company	Years	Dividends
Standard Oil Company (N.J.)	1952-1958	$ 80.94
Standard Oil Company (Ind.)	1951-1958	1,266.84
El Paso Natural Gas Company	1953-1958	2,474.26
Tennessee Gas & Trans. Co.	1953-1958	812.20
Equitable Gas Company	1955-1958	1,097.95
United Carbon	1951-1958	1,282.25

In addition to the above, the tax records reflect that Judge Lamar Cecil owned stock in the Gulf Oil Company as early as 1951 and apparently sold it on or before the end of 1955. During that period he received $970.26 in dividends from the Gulf Oil Company. Further, the tax

records reflect that Mrs. Cecil, from the year 1951 through 1958, and therafter, owned stock in United Carbon Company and during the period of 1951 through 1958 received dividends therefrom in the amount of $2,147.50. These figures do not reflect the Cecil's income from Humble stock.

In the trial of C. A. 2363, Respondent here urged upon the court and Judge Cecil found, that ". . . the entire bit manfuacturing industry and the entire oil industry are affected by and concerned with the validity of the claims. . . ." of petitioner's patent.[12]

5. Humble Stock

Although it is recognized that in its opinion dated October 15, 1968, in Appeal No. 16,780, this Court, en banc, speaking through Chief Judge Brown, stated that Mrs. Cecil's ownership of 100 shares of Humble stock was not a disqualifying factor,[13] evidence thereon was introduced in the Court below and it is again urged before this Court that the ownership of that stock by Mrs. Cecil at the time Judge Cecil assumed jurisdiction over C. A. 2363, was a "connection" with Humble, which, either standing alone or considered in combination with other connections and relations with Humble and its attorneys hereinafter set forth, disqualified Judge Cecil.

In September of 1944, Judge Cecil, then a practicing attorney in Beaumont, Texas, purchased in his name 50 shares of Humble stock, represented by certificate dated September 26, 1944 (Dep. Mrs. Cecil—P's Tr. Ex. #11, Dep. Ex. #1), (A. 100). On April 5, 1946, that

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12. 150 F.Supp. 143, 158 (Finding of Fact No. 86).

13. 403 F.2d 437.

certificate was cancelled and in lieu thereof a new certificate for 50 shares of Humble stock was issued in the name of Mrs. Cecil bearing certificate No. 52591 (Dep. Mrs. Cecil—P's Tr. Ex. #11, p. 9, Dep. Ex. #2), (A. 104).

Mrs. Cecil urges that the original purchase of the Humble stock by Judge Cecil was made with her money and should have been put in her name, but, apparently, the broker made a mistake. No bank records or other documentation has been introduced in evidence to support Mrs. Cecil's Contention of a mistake. However, for the purpose of its litigation and this appeal, appellant does not believe that as a matter of law it is significant whether either Judge Cecil or Mrs. Cecil purchased the stock or owned the stock or whether Mrs. Cecil purchased the stock from her individual bank account which may or may not have been community property. The fact of importance is that the Humble stock which had swollen to 100 shares in December of 1951 by virtue of a 2 for 1 stock split, was owned by the Cecils under the name of Mary Reed Cecil and was not sold until January 21, 1955 (A. 105-07), about one month prior to the trial of C. A. 2363.

It cannot be disputed that Judge Cecil was aware of the fact that the existence of the Humble stock, irrespective of the fact that it rested in his wife's name, would possibly be a source of embarrassment to him in the trial of C. A. 2363. This is made abundantly clear by an affidavit prepared by Mrs. Cecil on January 24, 1961, and filed in this Court by Humble on January 26, 1961, in Appeal No. 16,780 (P's Tr. Ex. #4), (A. 97). In fact, that affidavit shows that Judge Cecil had to urge Mrs. Cecil more than once to sell the stock and finally he became insistent that she do so. In this connection, Mrs. Cecil states, on page 2 of her affidavit:

> ". . . I protested to him that I did not desire to sell this stock. I thought his request that I sell the Humble Company stock, which was my separate property, because of the pendency of the suit against Humble Oil & Refining Company in his court was entirely unnecessary. From time to time he urged me to sell this stock and became more and more insistent that I do so. He stated that I would have to sell this stock in order to avoid any embarrassment or criticism. . . ."

It is not disputed, then, that Judge Cecil was adamant that this interest be removed in view of his jurisdiction over C.A. 2363. In determining just how adamant he was about this matter, it is clear that the sale of the Humble stock resulted in the Cecils incurring a substantial capital gains tax.

It is known that the 100 shares of stock were sold for $9,276.75 (Dep. Mrs. Cecil—P's Tr. Ex. #11, p. 67, L. 20, (A. 104-08); Dep. Ex. #4), (A. 97), and the Cecils were required to pay a tax upon an amount approximating $7,400.00, as a result of the sale.

6. Judge Cecil's Use of "Jet Bits"

Before, during and after the trial of C. A. 2363, Judge Cecil was actively engaged as an oil and gas operator in the Beaumont area (A. 212-18, 229-31) and, in fact, so characterized himself on the income tax returns filed during this period (Dep. Mrs. Cecil—P's Tr. Exs. #12, 94, Dep. Exs.), (A. 109, 212-18, 229-31). Necessarily, Judge Cecil was familiar with the oil business generally (A. 589, 842) and understood the profound significance which Kinnear's claim had on the entire oil industry.[14]

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14. Kinnear-Weed Corporation v. Humble Oil & Refining Company, 150 F.Supp. 143, 148 (Finding of Fact #86).

Furthermore, it is undisputed and the lower Court so held, that Judge Cecil participated in a substantial number of oil well drilling joint ventures as a non-operator, with the full knowledge that jet bits were being used in at least some of those wells, before, during and after the time that C. A. 2363 was before him (A. 589, 841-42).

The trial Court failed to make any finding regarding the involvement of Judge Cecil and his wife in oil well drilling ventures with others than Socs Vratis (A. 589). Nevertheless, the evidence of their involvement with Meredith & Co., or its predecessors, was clearly before the Court, and uncontradicted (Dep. Mrs. Cecil—Ps. Tr. Exs. # 12, p. 94, (A. 109), Dep. Exs.; Grissom and Goodman Affs.; Exs. #8, 9, (A. 796-802), Pet. Supp. Reply to Res. to Pet. to Vacate; Dep. Dishman—Ps. Tr. Ex. #140, pp. 11-21), (A. 342). In each instance the Cecils participated in a similar manner, with the extent of their investment being proportionate to their interest in the well.

The following table demonstrates the extent of Judge and Mrs. Cecil's commitment to oil well drilling, through the vehicle of "joint partnerships" or "working interest ownerships" (Dep. Vratis—Ps. Tr. Ex. #122, p. 6, L. 1-10; pp. 13-15; pp. 36-37), (A. 589). The evidence reflects that "jet bits" were used on all these wells as indicated:

TABLE

No. of Wells	Year	Drilled Wells by Name or Area	Joint Venture Partnership	Record Reference or Testimony
1-5	1951	Spindletop Area, 5 wells	Meredith, Clegg & Hunt	Goodman Dep. (A. 461-66); Goodman Aff., (A. 799).
6	1954	M. L. Gamble #1	Meredith & Co.	Grissom Aff. (A. 796); Cloninger Dep. (A. 544-89); Cruthirds Dep. #2 (App. 273).
7	1954	Felicia-Harris County	Meredith & Co.	Grissom Aff (A. 796); Cloninger Dep. (A. 544-89); Cruthirds #2, Ex. IG (A. 273); Fertita Tr. Test. p. 1008.
8	1955	C. Murphy #1	Socs Vratis	Cecils' Tax C-2 1955 (A. 213); Cruthirds #2, Ex. (A. 273); Vratis Dep. - p. 13, (A. 598-99).
9	1956	C. Byrd #1	Socs Vratis	Cecils' Tax C-2 1956 (A. 214); Cruthirds Dep. Exs. (A. 259-306); Vratis Dep. - p. 14, (A. 598-99).
10-19	1957	Exploration Plan, 9 wells 6 mos.	Meredith & Co.	Grissom Aff. (A. 796); Cloninger Dep. (A. 544-89); Cecils' Tax C-2 1957 (A. 215). Dishman Dep. (A. 342-62).

No. of Wells	Year	Drilled Wells by Name of Area	Joint Venture Partnership	Record Reference or Testimony
20		1957 Jefferson Oil-Hull	Fertita-Vratis	Cecils' Tax C-2 1957 (A. 216); Fertita Tr. Test. - p. 1008.
21-24	1958	Edwards; Edwards-Shelby; Shelby; Tyrrell-DuBois, 4 wells	Meredith & Co.	Dishman Dep. (A. 342-62), Exs.; Grissom Aff. (A. 796); Cloninger Dep. (A. 544-89); Cecils' Tax C-2 1958 (A. 123, 211-31).
25	1958	Blk. #154, Caplen	Meredith & Co.	Grissom Aff. (App. 796); Cecils' Tax C-2 1958 (A. 217); Dishman Dep. (A. 342-62).
26	1958	Edwards; Edwards-Shelby; Shelby; Tyrrell-DuBois	Meredith & Co.	Grissom Aff. (A. 796); Cecils' Tax C-2 1958; Dishman Dep. (A. 342-62).
27-32	1960	Doornbos Wells, 6 wells	Meredith & Co.	Cecils' Tax C-2 1960 (A. 134, 217); Dishman Dep. (A. 342-62); Grissom Aff.; Cloninger Dep. (A. 544-89).
33-39	1961	1961 Exploration Plan, 7 wells	Meredith & Co.	Cloninger Dep. (A. 544-89); Dishman Dep. (A. 342-62); Grissom Aff. (A. 796).
40-44	1962	1961 Exploration Plan, 1962 Amendment, 5 wells	Meredith & Co.	Dishman Dep. (A. 342-62); Grissom Aff. (A. 342-62); Cloninger Dep. (A. 544-89).

Judge Cecil participated in the drilling of oil wells principally as an investor in consort with Socs Vratis (Dep. Socs Vratis) (A. 591-96) and Meredith & Co. both of whom were independent operators in the Beaumont area. There is undisputed evidence in the record that both Socs Vratis (Dep. Vratis) (A. 598-99) and Meredith & Company[15] (See Dep. Dishman and Affs. of Grissom and Goodman, cited *supra*) used "jet bits" almost exclusively in the drilling of their wells. Furthermore, Judge Cecil visited at least three wells in which he participated during the critical dates (A. 601-03) and the evidence is uncontradicted that he knew that "jet bits" were being used on wells in which he participated (A. 603) and, in particular, the Catherine Murphy Well in Harris County, Texas, which Judge Cecil visited in 1955 (Dep. Vratis) (A. 602-03). Judge Cecil had a direct financial interest in the type of bits, and their efficiency (Dep. Vratis A. 589-605) and on occasion may have been consulted in their selection (Dep. Vratis A. 599, 600).

Judge Cecil's general knowledge of the oil industry (A. 603) and his particular knowledge of his own use of jet bits are particularly significant in light of the characterization which he placed on the plaintiff's case:

> "Plaintiff claims that C. W. Kinnear conceived the idea of positioning the water courses in the bit body so that the stream of drilling fluid discharged thereupon would miss the cutting elements and strike directly on the bottom of the hole in . . . a 'direct blast'. Plaintiff further contends that this concept . . . was disclosed . . . to Defendant . . . was utilized by defendant to its own advantage in the drilling of its wells, was disclosed by defendant to others . . . ."[16]

15. Also known as Meredith, Clegg & Hunt.

16. 150 F.Supp. 143, 148.

Also, Judge Cecil was aware of the fact that Humble's accused drill bit was a device which would reduce the cost of drilling wells by increased efficiency. For instance he said:

> ". . . Defendant's tests indicated that these 'jet' rock bits, when used in accordance with the 'jet' drilling technique, would drill faster than conventional rock bits under many drilling conditions."[17]

Judge Cecil explicitly recognized that "because of the broad scope which plaintiff asserts for the claims of Re-Issue Patent No. 23,416, the entire bit manufacturing industry and the entire oil industry are affected by and concerned with the validity of the claims of this patent".[18] With the certain knowledge of his own involvement in "jet drilling" there is implied in this finding the recognition that Judge Cecil himself was to be affected by the outcome of the case in which he sat as judge.

7. Fraud on the Federal Courts and the Petitioner

In October of 1959, Mr. C. W. Kinnear, President of appellant corporation, lodged in the Supreme Court a Motion for Leave to File a Brief Amicus Curiae in Case No. 435, which was the number assigned to this petitioner's original petition for writ of certiorari in *Kinnear-Weed Corporation v. Humble Oil & Refining Company* (P's Tr. Ex. #5).

In that Motion, Mr. Kinnear, among other things, alleged that Judge Lamar Cecil was disqualified under 28 U.S.C. 455 from sitting as trial judge in C.A. 2363 be-

17. Id. p. 152.

18. Id. p. 158 (Finding of Fact #86).

cause of (1) his royalty interests in oil and gas producing properties being operated by Humble in the Amelia Oil and Gas Field located near the city limits of Beaumont, Jefferson County, Texas, and, (2) because Judge Cecil was the owner, at his death, of 8 shares of the stock of Standard Oil Company of New Jersey, which company owned a controlling interest in Humble. Additionally, Mr. Kinnear alleged that Judge Cecil at the time of his death owned capital stock in 6 other oil and gas companies. This information was obtained by Mr. Kinnear from the appraisement of Judge Cecil's estate which was signed by his executor, Mrs. Cecil, on August 26, 1958 (Petitioner's Folder of Exhibits, Ex. #3), (A. 201-09).

Although leave was never granted to file Mr. Kinnear's motion, Humble by its attorney, Mr. Nelson Jones lodged an Opposition to that motion with the Supreme Court late in October of 1959 (P's Tr. Ex. #6).

That Opposition shows that Mr. Melvin Finck and Walter P. Morgan, staff attorneys for Humble were of counsel on the pleading and that retained counsel Mr. B. D. Orgain and Mr. Garrett R. Tucker, Jr., were also of counsel on the pleadings.

In its Opposition, Humble belittled the arguments of Mr. Kinnear relating to Judge Cecil's disqualification in the following language:

> "Little need be said concerning Kinnear's attack upon the integrity of Judge Cecil, now deceased. *The only showing Kinnear makes of a connection between Judge Cecil and the Respondent is (a) that Judge Cecil owned some stock in Standard Oil Company of New Jersey* (a corporation affiliated with Respondent by majority stock ownership), *and* (b) that Judge Cecil, along with a number of other

> royalty owners, executed *a pooling agreement with Respondent and Gulf Oil Corporation,* the operators of certain oil and gas leases in the Amelia Field, Jefferson County, Texas. The utter preposterousness of Kinnear's claim that Judge Cecil was disqualified is illustrated by the fact that his stock interest in Standard Oil Company of New Jersey was valued by his estate at $399 and consisted of 8 shares out of the 215,000,000 shares of the corporation's stock outstanding, while Judge Cecil's royalty interest in the Amelia Gas Unit No. 1, the subject matter of the above-mentioned pooling agreement, was valued at a mere $250. . . ." (emphasis supplied) (P's Tr. Ex. #6, p. 3). (A. 202, 204, 668-69).

Humble also dismissed Judge Cecil's ownership in other oil and gas companies by claiming that if they were a disqualifying factor then many of the federal judges in Texas and probably other jurisdictions as well would have been eliminated from sitting as trial judge in C.A. 2363. *Mr. Nelson Jones* stated that at the time Humble filed its Opposition to Mr. Kinnear's motion *he made no investigation to determine* whether or not there was *any other relationship* or *connection between Humble and Judge Cecil* and that he did not think such an investigation was necessary (Dep. Nelson Jones—P's Tr. Ex. #21, (A. 312-13).

Thereafter, on or about December 5, 1960, the petitioner-appellant lodged with this Court, in Appeal No. 16,780, a Motion to Open Case, Reverse, Vacate, etc., and that motion was ordered filed by this Court on December 27, 1960 (Respondent's Appendix II, Ex. E) (A. 668-69). This motion reflected that the petitioner had gained additional information relating to Judge Cecil's relationship and connection with Humble between October of 1959 and December of 1960. For instance, gen-

eral allegations were set out concerning Coastal Tool Company (Respondent's Appendix, Ex. E, p. 8) concerning certain other royalties received by the Cecils from Humble (Ex. E, p. 7) and the ownership of Humble stock (A. 101-08). Humble then filed its Response to the petitioner-appellant's December 1960 Motion and virtually ignored the allegation of relationship and connection electing rather to direct its attack at the timeliness of the said motion (Respondent's Appendix, Ex. E, p. 19) (A. 668-69). In respect of the allegation of relationship and connection, Humble promptly reasserted and quoted from its response to Mr. Kinnear's pro se Motion in the Supreme Court, apparently relying upon their asserted belief that Mr. Kinnear's claim of judicial disqualification was "utter preposterous" (Ex. E, p. 24) (A. 668-69). Additionally, in that response, *Humble, apparently to mislead this Court,* stated that Mr. C. W. Kinnear, at the time his pro se Motion was addressed to the Supreme Court, had knowledge of all the matters set forth in petitioner-appellant's December, 1960 Motion to Open Case, Reverse, Vacate, etc. (Ex. E, p. 23) (A. 1072). It should be noted that in fact petitioner had set out in his said Motion an allegation that Judge Cecil and/or his wife had royalty interests in mineral lands with Humble upon which Humble operated wells and produced oil and gas. More specifically, petitioner attached to that motion the appraisement of Judge Cecil's estate which, although unknown to petitioner at that time, set forth Judge Cecil's interest, on page 2 thereof, in the E. H. R. Wallace Survey in Chambers County, Texas, the same royalty interest which was the basis of the *Beck* case. Humble again chose to ignore the existence of the *Beck* case, although one of its attorneys of record on the Opposition was Mr. Walter Morgan, who throughout the

trial of C.A. 2363 and subsequent appellate proceedings was aware of the existence of the *Beck* case and Judge Cecil's role therein as plaintiff and attorney (Dep. Morgan —P's Tr. Ex. #18, p. 35), (A. 419). Also, Mr. Nelson Jones, counsel of record for Humble on the Opposition was "probably" aware of the existence of the *Beck* case during the trial of C.A. 2363 (Dep. Morgan—P's Tr. Ex. #18, pp. 36, 37 (A. 419); Dep. Jones—P's Tr. Ex. #34, p. 32), (A. 314).

Nowhere in its Opposition did Humble come forward and reveal the extensive leasing relationship between it and Mrs. Cecil on the Sabine Tram lands (see p. 15, *supra*). Although appellant's Motion before the Court of Appeals raised the issue of Coastal Tool Company, Humble chose to ignore that issue in its response when its corporate records would have revealed the exact amount of business Humble did with Coastal and the affidavit received by Humble from Coastal within a few days of the trial of C.A. 2363 would have shown that Judge Cecil was an officer and director and stockholder of Coastal Tool Company.

At no time during any of the proceedings in C.A. 2363 from its inception to this date, has Humble ever come forward in any Court and volunteered any information or assistance to any Court concerning its relationship and connection with Judge Cecil. No citation to the record is required to prove this fact. Likewise, Humble has never advised petitioner of any such matters at any time and since Judge Cecil never mentioned any relationship or connection with Humble. All information presented to this court in this petition, the record and the appendix was obtained only through the endeavor of the petitioner subsequent to Judge Cecil's death.

Finally on this issue, the record reflects that Mr. Walter B. Morgan, the principal attorney in the *Beck* case on behalf of Humble who attended that trial every day and negotiated the settlement of that lawsuit, also entered his appearance as attorney for Humble in C.A. 2363 shortly after the complaint was filed in 1953 (Dep. Morgan—P's Tr. Ex. #18, p. 33), (A. 419). Additionally, Mr. Morgan participated in pretrial matters in open court in C.A. 2363 on behalf of Humble and at all such times he was aware of the existence and status of the *Beck* case, and at no time did he or his supervisor Mr. Nelson Jones make any revelation of that case to the appellant nor did Mr. Morgan or Mr. Jones call that matter to the attention of the Court (Dep. Jones—P's Tr. Ex. #34, (A. 314); Dep. Morgan—P's Tr. Ex. #18, (A. 419).

In summary, Mr. Morgan was participating in C.A. 2363 before Judge Cecil in the courtroom and then returning to his offices to negotiate a settlement in the *Beck* case in which, as he knew, Judge Cecil was a plaintiff. All of the correspondence concerning settlement, prepared by Mr. Benckenstein for the plaintiffs, addressed to Mr. Morgan, indicated copies to Judge Cecil (Dep. Benckenstein—P's Ex. #19, Dep. Exs. 4-9), (A.). During the period of time covering the exchange of settlement correspondence the pretrial conference had been held before Judge Cecil, as indicated above, many orders had been entered concerning discovery, and Judge Cecil had denied the petitioner here its demands for a trial by jury in C.A. 2363 (P's Tr. #2), (A. 947, Item 65).

Therefore, the undisputed facts show that Judge Cecil and Humble and its attorneys all were acutely aware of the *Beck* case and the settlement negotiations therein while they sat in the same courtroom with the appellant in C.A. 2363.

REASONS FOR GRANTING THE WRIT

The principal contention upon this appeal is that a point may be reached under the terms of the "Judicial Disqualification Statute"[19] where a Judge's interest in a case before him and his relationship to, and connection with, a party or his attorney involved in that case are so extensive that a determination of qualifications is not only a gross abuse of the discretion permitted but, also, erroneous as a matter of law and reversible error. This is such a case. Corollary to this contention, and equally important, is the contention that although a certain degree of discretion is permitted to the trial judge under Section 455, such discretion may not be exercised in secret. Stated differently, it is contended that where there are such interests, relationships and connections that a trial judge consciously forms an opinion that he is qualified to sit, *due process then creates a duty upon the court to make a full disclosure to all parties to the litigation of all matters relevant to the formation of that opinion.* In this way and only in this way may the validity of this opinion be tested in the appellate courts. A breach of this duty must be considered reversible error. The failure to place such an interpretation upon the statute would render it meaningless.

In this case, the record below supports the conclusion that Judge Lamar Cecil was disqualified as a matter of law from sitting as the trial judge in C.A. 2363 because of impermissible interests in the outcome of that case and impermissible relationship to and connection with Humble and its attorneys. Much of this argument is necessarily devoted to summaries of such interests, relationships and connections most of which are not in factual

19. 28 U.S.C. 455 (see footnote 2, *supra*, for text).

dispute. There is no contention in this case and, indeed, no evidence, that Judge Cecil ever revealed to the appellant any of these matters and there is no evidence that appellant received any such knowledge until after the death of Judge Cecil, which occurred after he had relinquished to demonstrate that if this Court finds a duty of disclosure, that duty was breached by Judge Cecil.

It is further contended that where a party to litigation or its attorneys and the trial judge such as may be proscribed by 28 U.S.C. 455, that party and its attorney have a duty under law to the court to bring such relationships and connections to the attention of the court and the parties involved in the litigation where the trial judge has failed to do so. In this case not only did Humble knowingly breach this duty, it tacitly and fraudulently misrepresented its actual knowledge and the knowledge of its attorneys in formal pleadings filed in this Court and in the Supreme Court after the question of disqualification had been raised by the appellant.

Finally, it is contended that it was a gross abuse of judicial discretion for the lower court to award to Humble its costs, expenses, including attorney's fees, expert witness fees and related costs, relating to the examination into the authenticity of original trial Exhibit D-31 and to preclude further and complete testing of that Exhibit.

I. Disqualification of Judge Cecil

A. Relationship to and connection with Humble and its attorneys

Under the Statement of Facts section, set out above, certain of the fact categories are relevant to Judge Cecil's disqualification as trial judge in C.A. 2363, demoinstrating impermissible relationships and connec-

tions with Humble and its attorneys under 28 U.S.C. 455. In this regard the Court's attention is directed to the categories described as (1) Coastal Tool Company, (2) *Beck* Case, (3) Sabine Tram Lands, and (5) Humble Stock.

It is fundamental to the American system of justice *that every litigant is entitled to a fair and impartial court as a basic requirement of due process* and *even the possibility of unfairness must be eliminated. In re Murchison.*[20] The United States Supreme Court has added to this fundamental requirement of a fair and impartial court the requirement that justice must satisfy the appearance of justice. *Offutt v. U. S.*[21] More recently, in 1968, the Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co., et al,*[22] stated that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.

In the *Commonwealth* case, the petitioner, as subcontractor, sued on a contractor's bond to recover money alleged to be due and owing for a "paint job" from the prime contractor. Pursuant to an arbitrator's agreement, the parties each selected one arbitrator and they in turn selected a third arbitrator. After the arbitration was completed Commonwealth discovered that the third arbitrator had acted as a paid consultant on behalf of the prime contractor. This business relationship had been sporadic, and there had been no dealings between the arbitrator and prime contractor for nearly a year preceding the ar-

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20. 349 U.S. 133, 136; 75 S.Ct. 623; 99 L.Ed. 942 (1955).

21. 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954).

22. 89 S.Ct. 337, 340 (1968).

bitration. This relationship was, of course, known to the arbitrator and the prime contractor, but at no time did either reveal this relationship to Commonwealth. The arbitrators' award was sustained by the District Court and the Circuit Court, but was reversed by the Supreme Court on the ground that the elementary requirements of impartiality, taken for granted in every judicial proceeding, are not suspended when the parties agree to resolve a dispute through arbitration. Justice Black, writing for the majority in *Commonwealth,* relying *on Tumey v. State of Ohio,*[23] pointed out that a court decision should be set aside where there is "the slightest pecuniary interest" on the part of a judge. Justice Black went further, to say that "since in the case of courts this is a *constitutional* principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of 'evident partiality' or use of 'undue means' ".

It is clear then that federal judges do not have an unbridled discretion in determining their qualification to sit as a trial judge under the provisions of 28 U.S.C. 455. Obviously, when relationships and connections give the appearance of bias or partiality to one party or the other a judge must disqualify himself under the provisions of the statute and the guaranties of the Fifth Amendment to the Constitution. This is a case where the trial judge not only should have found that his relationship and connections with Humble and its attorneys would at least give rise to a charge of apparent bias on behalf of Humble, but also that those relationships and connections with Humble were so involved that he was dis-

23. 273 U.S. 510; 47 S.Ct. 437; 71 L.Ed. 749 (1927).

qualified as a matter of law from sitting as trial judge in C.A. 2363.

Because Judge Cecil never communicated to appellant any of the relationships and connections which the facts here represent, the question arises as to whether or not he was aware of the existence of possible disqualifying factors. The answer is clearly, yes. Humble submitted an affidavit of Mrs. Cecil to this court in 1960 (A. 97-99) in which she revealed that Judge Cecil was adamant that she sell her 100 shares of Humble stock so that he would not be embarrased in the trial of C.A. 2363. Jude Cecil is, of course, deceased, and this court cannot determine from his state of mind in determining his qualification. However, from Mrs. Cecil's affidavit, it is obvious that the question of relationship and connection with Humble was uppermost in his mind. So much so that he was willing for his wife to incur a substantial capital gain tax liability on the sale of the Humble stock. The stock was bought for $1,800 and sold for $9,276.75, or, capital gain of $7,476.75. Mrs. Cecil's Affidavit clearly shows Judge Cecil knew he was disqualified in this case. But he tried to conceal his stock interest in Humble. Humble knew he had the stock. He certainly knew it as he bought the stock. All Judge Cecil had to do was to certify his disqualification to the Chief Judge of the Fifth Circuit Court of Appeals and a qualified judge would be appointed to hear this case. Why did Judge Cecil and Humble hide this stock interest? Concealment of an interest both he and Humble were duty bound to disclose is fraud on Petitioner and all Federal Courts before whom this stock interest has been presented. It was a fraud upon the District Court, Court of Appeals for the Fifth Circuit and the U.S. Supreme Court. Petitioner is entitled to all its costs, attorneys fees and damages, both compen-

satory and punitive and the Supreme Court should grant such relief to Petitioner.

With this background in mind, it must also be concluded that he was aware of the relationship between Coastal Tool Company and Humble. This fact was found by the lower court (A. 833, Item 9). Likewise, it must be concluded that Judge Cecil was aware of the substantial income derived by his wife and himself from the Sabine Tram leases with Humble. Finally, it is equally apparent from the facts that Judge Cecil was keenly aware of the fact that Humble was a defendant in the *Beck* case in which he was a party plaintiff and part-time attorney prior to his accession to the bench. The court will recall that virtually up to the trial date of C.A. 2363, Judge Cecil was continually advised by his attorney, Mr. Benckenstein, of the status of settlement negotiations with Mr. Walter Morgan, attorney for Humble, as he received copies of all settlement correspondence. Also, Judge Cecil deposited in his bank his share of the *Beck* settlement proceeds on or about April 14, 1955, just several weeks after the conclusion of the trial in C.A. 2363 (Dep. Mr. Bean — P's Tr. Ex. #135, p. 18), (A. 480).

In summary then, it must be concluded that Judge Cecil was aware of all of his relationships and connections with Humble. Why he chose to force his wife to sell her Humble stock without eliminating his interest in Coastal Tool Company; without withdrawing from the *Beck* case, and without selling his interest in the lease involved in that case; and without requiring his wife to divest herself of all of her interest in Sabine Tram, is only a matter of conjecture since his mental processes cannot be examined today. One hypothesis is that Humble stock ownership

records were easily available to anyone interested and might be the first place where a party might look to determine whether a Judge had an actual ownership interest in a corporate party.

Another hypothesis was advanced by the court below at p. 45 of its Conclusions of Law (A. 853) and it concluded that Judge Cecil's insistence that the Humble stock be sold showed his sensitivity to the provisions of Section 455 and to Canon 26 of the Canons of Judicial Ethics[24], and that the sale of the Humble stock showed a desire on the part of Judge Cecil not only to preside fairly but to give "the appearance to all right thinking persons that he presided fairly." Appellant submits that the lower court's hypothesis is erroneous because it immediately raises the questions as to (1) why Judge Cecil did not advise the parties then before him that he was making the sale of stock so that "right thinking persons" would know that he presided fairly, and (2) why he did not believe that those more substantial, but less easily discoverable, relationships and connections should be disposed of to give "the appearance to all right thinking persons that he presided fairly". Alternatively and properly, Judge Cecil should have disqualified himself as trial judge in C.A. 2363.

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24. "JUDICIAL CANON 26. PERSONAL INVESTMENTS AND RELATIONS. A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties." (American Bar Association, Canons of Judicial Ethics.)

Judge Connally concluded at p. 45 of his Conclusions of Law (A. 853) that Judge Cecil's relationships and connections with Humble were in each instance completely adverse to those of Humble and Humble's gains were invariably Judge Cecil's losses. He, thereafter, concluded that because of this fact Judge Cecil's determination to sit as trial judge in C.A. 2363 "was in keeping with the high principles which are the obligation of every judicial officer" (A. 853-54). Petitioner is unable to fathom the lower court's rationale in this regard. If this rationale were accepted, there are absolutely no business dealings a judge could have with a party litigant, no matter how close nor how large, which would be disqualifying. To carry the lower court's theory to its logical extreme there would have been no disqualification in this particular instance if Judge Cecil owned all of the land and received all of the royalty where Humble produced all of its oil and gas, or if he had owned all of the stock of a corporation which did millions of dollars of contract work for Humble every year. In each of these exaggerated examples, it is presumed that the lower court would have found that Humble's gains were invariably Judge Cecil's losses.

From each of the factual issues of relationship and connection it can be seen that the problem confronting the appellant in concluding that it did not receive a fair and impartial hearing in C.A. 2363 is the appearance given that it would be at least possible for Humble's losses to be Judge Cecil's gains.

The existence of Judge Cecil's relationship with Coastal Tool Company was not only an apparent violation of Judicial Canon 26 of the American Bar Association, but also presented a situation wherein the judge's desire to

maintain Humble as a valued customer, coupled with the expectation that Humble's business with Coastal might increase could have influenced his decision.

In the *Beck* case it appears to appellant that Humble's connection may have influenced Judge Cecil to rule in favor of Humble in C. A. 2363. The Sabine Tram Lands also represented a situation wherein Judge Cecil could have been influenced to rule on behalf of Humble in hopes that Humble would more actively pursue its development rights under its leases.

It can be seen that the basic objection of these relationships and connections is that the Judge had become involved in situations where he could benefit by ruling in favor of Humble in C. A. 2363. The realization of benefits from Humble might consciously or even subconsciously influence his impartiality. The real problem is that no appellant, knowing of these extensive relationships and connections, could ever be satisfied that it had received a fair and impartial trial. Like every litigant, the appellant here believed that its case in C. A. 2363 was a meritorious one and it can never be satisfied that it received an impartial determination on that case. Therefore, without doubt, Judge Cecil's relationships and connections with Humble denied the petitioner the due process of law, to which it was entitled.

The *Beck* case represents a factual situation which, to the knowledge of the petitioner, has never come before any federal appellate court. It is submitted that the reason it has not is that no federal judge has ever concluded that he is qualified to sit as trial judge in a case while he is simultaneously litigating with one of the parties before him. Should this court rule that Judge Cecil is not disqualified as a trial judge in C. A. 2363 as a matter of

law, it will be setting a rule of law that permits a federal judge, secretly or openly, to litigate his own independent lawsuit with one of the parties before him. No argument should be required that such a rule of law cannot be tolerated under our system of justice. Likewise, it would appear that should this court rule that Judge Cecil was qualified to sit as trial judge in C. A. 2363, a federal judge may covertly or overtly have unlimited business dealings with one of the parties before him in litigation and receive unlimited income therefrom so long as that judge is presumed to have determined that these business relationships will not influence his judgment. Obviously, 28 U.S.C. 455 cannot be so interpreted, and this court must set guidelines for the proper interpretation of that statute. This court will recognize that no reported case in the annals of American jurisprudence comes close to revealing the extensive relationships and connections shown in this case.

As this court knows, Chief Judge Brown, writing for the *en banc* panel, stated in his opinion[25] that Mrs. Cecil's ownership of the Humble stock was not a disqualifying factor. However, notwithstanding Judge Brown's opinion, the lower court permitted evidence to be introduced thereon so that the petitioner would receive a full hearing. Bearing this in mind, petitioner nevertheless believes that this court should reconsider the effect of the Humble stock as a disqualifying relationship. Judge Cecil ruled on many adversary pretrial matters between the petitioner and Humble in C. A. 2363 while his wife owned the 100 shares of Humble stock. Although Humble has tried to minimize the extent of that holding by comparing it to all of the Humble shares outstanding, the Cecils' interest

25. 403 F.2d 437.

in Humble stock was a substantial asset in the Cecils' portfolio of securities. This stock ownership gives the appearance of an influence which could have, at least subconsciously, affected the court's decision. Indeed, an investor in a corporation considers himself a company man. It is further submitted that Judge Cecil's sale of the Humble stock about one month prior to the actual date of trial of C. A. 2363, does not remove the initial disqualification resulting from that ownership. *In re Honolulu Consol. Oil Co.*[26] However, Judge Cecil held the stock until Jan. 21, 1955 after the first trial date of Jan. 17, 1955. Also after denying Jury demand of Jan. 14, 1955 after Amended Complaint filed and served on Jan. 14, 1955 and within 10 days from date of service of this last pleading (Rule 38, Federal Rules of Civil Procedure).

B. Judge Cecil's Substantial Interest in the Case

Petitioner urges upon this court that categories (4), (5) and (6) in the Statement of Facts, namely, the Cecils' interest in other oil and gas companies, the Humble stock, and the Cecils' use of "jet bits" represent substantial interests in the outcome of the trial of C.A. 2363 and thus disqualified Judge Cecil as a matter of law from sitting as a trial judge in C.A. 2363.

As this court can see from the facts stated under category (4) Judge and Mrs. Cecil owned stocks in a number of major oil and gas companies other than Humble and received substantial income therefrom prior to, during and after the trial of C.A. 2363. It is submitted that the ownership of these stocks in light of the allegation made by the petitioner in C.A. 2363 and the claim that it owned the patent to the "jet bit" placed the ownership

26. 243 F. 348; 156 CCA 128 (Cal. 1917).

of these stocks in the same category as if these shares represented stock in Humble.

It was abundantly clear to Judge Cecil at the time of the trial that all major oil and gas companies drilled oil and gas wells with the "jet bit" and that should he find that the petitioner was the owner of the patent for the "jet bit" and that Humble had infringed that patent, it would be tantamount to a finding that such other companies were also infringers of appellant's patent. This court need only look at Judge Cecil's finding #86[27] wherein Judge Cecil found that petitioner's claims for his patent were so broad that the entire oil and gas industry was affected. Accordingly, Judge Cecil well knew that to find against Humble and in favor of petitioner would substantially affect these other oil and gas companies in which he and his wife owned substantial stock and such a finding might well result in future judgments against those companies, an increase in the cost of their production and a consequent loss of income to Judge and Mrs. Cecil. The ownership of these stocks gave Judge Cecil a clear substantial interest in the case before him in C.A. 2363.

Mrs. Cecil's ownership of the Humble stock without question gave to Judge Cecil a substantial interest in the outcome of C.A. 2363, since any rulings adverse to Humble might tend to decrease the value of that stock.

Under category (6) in the Statement of Facts contained in this brief, it is documented that Judge and Mrs. Cecil were oil and gas operators, before, during and after the trial of C.A. 2363, engaged with others in the drilling of oil wells. In the Statement of Facts on this matter, it is clearly shown that Judge Cecil knew at the time of the trial of C.A. 2363 that a number of the wells in which

27. 150 F.Supp. 158.

he had an interest were being drilled with bits of a type which were accused by the petitioner in C.A. 2363 as infringing on petitioner's patents.

The lower court found, and the record below is uncontradicted, that Judge Cecil during the trial of C.A. 2363 was aware of the significance of a "jet bit" and was also aware that "jet bits" were used in the drilling of certain of the wells in which he had an interest. Although it is true that Judge Cecil, as found by the lower court, generally made no decision on the type of bits used in these wells (although in many instances he was kept advised of the type used), any device or any means used in reducing the costs of drilling a well resulted in a reduced expense share to him and Mrs. Cecil in the drilling of their wells. Since the "jet bits" were most efficient in drilling wells, Judge and Mrs. Cecil's expenses were thereby reduced.

The lower court dismissed this entire issue apparently on the basis that a patent infringement suit is an action in tort and that a non-operator in a drilling venture such as the Cecils, is not responsible for the torts or contracts of the operator or drilling contractor in the venture. The lower court cited a number of cases[28] in support of this position but it is asserted that these cases are simply not applicable to this particular situation. In fact, the lower court, citing other cases,[29] correctly stated the law relating

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28. *Seifert v. Brown,* 53 S.W.2d 117 (Tex. Civ. App. 1932); *Snodgrass v. Kelley,* 141 S.W.2d 381 (Tex. Civ. App. 1940); *Rucks v. Burch,* 156 S.W.2d 975 (Tex. S.Ct. 1941); *Southern Underwriters v. Gariepy,* 105 S.W.2d 760 (Tex. Civ. App. 1937); *Berchelmann v. Western Company,* 363 S.W.2d 875 (Tex. Civ. App. 1962).

29. *Bewal, Inc. v. Minnesota Mining and Manufacturing Co.,* 292 F.2d 159 (10th Cir. 1961); *Lockerbie, Inc. v. Fruhling,* 207 F.Supp. 648 (E.D. Wisc. 1962); *Turner v. Quincy Market Co.,* 225 F. 41 (1st Cir. 1915).

to infringement, that is, that to be an infringer, one must actively participate in or directly benefit from infringement. It is beyond doubt that before, during and after the trial of C.A. 2363, Judge and Mrs. Cecil were directly benefiting from the reduction in drilling costs of the wells in which they participated as a result of the use of "jet bits". Obviously, cases dealing with negligent tort or with contract do not apply to the law of patent infringement.

The point made here by petitioner is that Judge Cecil, being aware of the fact that the entire oil industry, including his own well operations, were affected by the claims of petitioner's patents, and realizing that the ruling in favor of the petitioner might well increase the expenses of his personal drilling operations or, indeed, conceivably subject him to a charge of patent infringement, nevertheless determined that he would act as trial judge in C.A. 2363. The Cecils' use of "jet bits", or bits of the type accused in C.A. 2363, present a clear and substantial interest in the outcome of C.A. 2363 and disqualifies Judge Cecil as a matter of law.

C. Duty of Disclosure

As this court now knows from the contentions set forth in the first part of this argument, petitioner contends that it is implicit in 28 U.S.C. 455, that when a judge has a relationship or connection with a party or its attorney or a substantial interest in the outcome of a case before him and reviews those matters so that he can determine, in his opinion, whether he should sit, those matters must be revealed to the parties to the litigation. It is equally clear that if he determines in his opinion he is not qualified to sit, he need not reveal any of the matters considered in forming his opinion. Absent this court's determination that such a requirement is implicit in the statute, the

judge's opinion on his disqualification may never be tested. If this court rules that the requirement of disclosure is not implicit in the statute then such a ruling will place on litigants the burden to conduct secret investigations into the private affairs of the federal judiciary, in order to be certain that a particular judge is qualified to sit. This would be an intolerable burden on litigants and certainly could not have been intended by Congress. This court is urged to rule that the failure of a judge to so reveal his relationship and connection with a party, or its attorney, or his interest in the case, is reversible error.

It is not contested in this proceeding that Judge Cecil never revealed to the petitioner at any time any of the relationships, connections or interests set forth in this brief. Also, there is no dispute as to the fact that Humble at no time ever brought any of these matters to the attention of petitioner. Petitioner believes and asks this court to so rule, that the law requires a party litigant, having knowledge of relationships or connections between itself and a trial judge, to advise the opposing party or parties of such relationships or connections, and to bring those matters to the attention of the judge in the event he has overlooked them.

It is submitted that the Supreme Court in *Commonwealth Coatings Corporation, supra,* clearly indicates that such disclosure is required of judges under the intentment of Canon of Judicial Ethics, No. 33, which provides in part:

> "Social Relations.
>
> "* * * (A judge) should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to

> awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."

Justice Black speaking for the court, equated Canon 33 to Rule 18 of the American Arbitration Association, which is as follows:

> "Section 18. Disclosure by Arbitrator of Disqualification—At the time of receiving his notice of appointment, the prospective Arbitrator is requested to disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the Tribunal Clerk shall immediately disclose it to the parties, who if willing to proceed under the circumstances disclosed, shall, in writing, so advise the Tribunal Clerk. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of this Rule."

Justice Black concludes that Rule 18 and Canon 33 both rest on the premises that any tribunal permitted to try cases and controversies must not only be unbiased but also must avoid even the appearance of bias. He makes it very clear that in matters of arbitration any dealings which might create an *impression of possible bias* must be disclosed by an arbitrator. That ruling read in conjunction with the first paragraph of Judge Black's opinion leave no doubt that this requirement of disclosure is taken for granted in judicial proceedings.

II. Fraud on the Federal Courts and the Petitioner

Petitioner contends that not only did Humble have a duty to reveal its relationships and connections with Judge

Cecil, and that as a matter of law it breached that duty, but also that Humble is chargeable with fraud on the federal courts for its failure to reveal those relationships and connections, and its tacit misrepresentations concerning those matters. In this connection, the court is respectfully asked to refer back to the Statement of Facts contained in this brief under category (7) so that those facts will not have to be set forth in any detail in this section of the argument.

Mr. Walter Morgan, who was Humble's attorney in the *Beck* case, and who participated in C.A. 2363 on behalf of Humble, has testified that he was aware at all times during the trial of C.A. 2363 of the existence of the *Beck* case. He testified that Judge Cecil was a party plaintiff in the *Beck* case and had represented the plaintiffs in that case as an attorney on one day of the trial. Mr. Morgan was also obviously aware that the settlement correspondence he received from Mr. Benckenstein, which was written during significant pretrial stages of C. A. 2363, was being sent to Judge Cecil by carbon copy. Mr. Morgan admits that he may have discussed the *Beck* case with Mr. Nelson Jones, his superior, who was in charge of C. A. 2363 on behalf of Humble, but his recollection is uncertain. Mr. Jones also has a recollection of the existence of the *Beck* case during the pretrial proceedings and thereafter in C. A. 2363. Certainly Humble's attorneys must have realized that, had they revealed to Petitioner the existence of the *Beck* case, appellant would have immediately asked Judge Cecil to disqualify himself, yet they consciously decided not to do so. This alone must be considered a fraud upon the district court and a fraud perpetrated upon the petitioner. Petitioner was, by the inaction of Humble, denied its right to assure itself of an impartial tribunal or, at minimum, a tribunal which

gave the appearance of impartiality. Additionally, Humble as a corporation had received written notice during the month of January in 1955 that Judge Cecil was a stockholder and an officer and director of Coastal Tool Company. Accordingly, Humble's staff attorneys either knew or should have known of such a relationship. If they were not advised of this relationship, it is clear that after the issue of disqualification was raised, they were on sufficient notice to make an investigation as to any connection that may have existed between Humble and Judge Cecil. Such an investigation would also have revealed the Sabine Tram leases to which Judge Cecil was a signatory. Humble's failure to reveal these matters or to make an investigation into such matters in the light of their admitted knowledge of the existence of the *Beck* case, is a fraudulent denial of the petitioner's right to due process.

When Mr. C. W. Kinnear first challenged Humble with the question of disqualification, Mr. Walter Morgan and Mr. Nelson Jones, Humble's attorneys, chose to belittle Mr. Kinnear's showing of disqualifying relationships and connections, and advised the Supreme Court that they were utterly preposterous. The requirement imposed upon counsel to treat courts with all candor apparently was far distant from the minds of Mr. Morgan and Mr. Jones, both of whom had full knowledge of the *Beck* case at the time the question of disqualification was raised at the Supreme Court. Since they chose to belittle rather than to come forward and admit what they knew, their fraudulent concealment and tacit misrepresentation is only compounded by the fact that the copy of the Appraisement of Judge Cecil's estate filed in the Supreme Court, revealed Judge Cecil's interest in the E. H. R. Wallace Survey, the land involved in the *Beck* case. The fact of the matter was simply that Mr. Kinnear at that time had

not discovered the *Beck* case and, therefore, had no knowledge that Humble was connected therewith. Humble's representations in the Supreme Court relating to disqualification are a clear fraud upon that court and a fraud upon the petitioner. Once the allegation of relationships and connections was made, Humble had a duty to completely review the files and bring to the attention of the Supreme Court any and all matters which might be relevant to the issue of disqualification. To hold that the conduct of Humble's staff attorneys at the Supreme Court was proper and not fraudulent would be an announcement to counsel that full candor with the courts was no longer a requirement of the legal profession.

It was the duty of Humble and Judge Cecil to disclose to Petitioner-plaintiff the true facts that surrounded the *Beck* Case. Humble obtained a fraudulent judgment thereby. Judge Cecil and Humble's concealment of the facts in that case falls squarely within the conspiracy ruling of the Supreme Court in the case of *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 322 U.S. 271, 88 L.Ed. 1269 (1944), at page 273 held:

> "Hartford can derive no aid from the fact that Shawkee reported to the Circuit Court its belief as to the deceptive authorship of the Clarke article. With that charge on the record, honest dealing with the Court required that Hartford should make a full disclosure of its fraudulent conspiracy. Its failure to do so under these circumstances aggravated the previous deception it had practiced on the Patent Office and the courts."

Had Humble at any stage of the proceedings properly responded to its duty of candor to the appellant, many thousands of dollars, and hours of time would have been

saved, and the present set of relationships and connections would have been before this court long ago.

Essentially, the same tacit misrepresentations were made to this court in 1960 when Humble again belittled petitioner's attempt to convince the Court of Appeals that it had sufficient information to require said court to rule that Judge Cecil was disqualified as a matter of law as the trial judge in C. A. 2363. In the Court of Appeals in 1960, Humble again quoted extensively from its Opposition filed in the Supreme Court, to the effect that Kinnear's claim of disqualification was "preposterous". It also chose not to offer any assistance to the Court of Appeals on the issue of disqualification and again chose to conceal the existence of the *Beck* case from said court.

It is submitted that Humble has been guilty of unconscionable and illegal fraudulent conduct against the Supreme Court, the Court of Appeals and the District Court for the Eastern District of Texas and the petitioner, and as a result of that fraudulent conduct the federal court system has suffered and petitioner has been put to unwarranted costs and labor. For this the appellant should be compensated by Humble.

III. Original Trial Exhibit D-31

The judgment of the lower court, among other things, assessed certain costs against petitioner.[30] The extent of that judgment for certain costs and expenses is to be determined by the lower court in a subsequent proceeding, should this court uphold that award. This award in the lower court judgment is not only erroneous, it is totally unconscionable.

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30. The expenses incurred by Humble in connection with the investigation into the authenticity of a Hughes Tool Company 3-cone rock bit, allegedly of the vintage 1910-1911.

Exhibit D-31 was introduced by Humble in C.A. 2363 for the purpose of showing that it embodied and anticipated all of the claims of the petitioner's patents and that it had been made, sold and used more than one year prior to the date of appellant's patent. In this endeavor, Humble was successful, since Judge Cecil, at Finding #76(b)[31] found that Exhibit D-31 predated petitioner's original filing date by more than one year and that D-31 showed that the practice of positioning the water courses in a bit body so that the drilling fluid would miss the cutters and strike directly on the bottom of the hole was old and well known in the trade. In addition, Judge Cecil at Finding #77[32] found that D-31 had been sold and used prior to the date of the petitioner's patent.

For a number of years prior to the proceeding in the lower court, it had been the opinion of Mr. C. W. Kinnear, petitioner's president, that Exhibit D-31 had been altered, in an attempt to show that the claims of his patents had been anticipated. He based this opinion upon his many years of experience in the oil fields both in the United States and abroad. This was and still is Mr. Kinnear's opinion. This matter was brought to this court's attention earlier in petitioner's original Petition which ultimately resulted in the lower court proceeding.

When this matter was referred by this Court to the United States District Court for the Southern District of Texas for further evidentiary hearings, counsel for petitioner again urged the lower court that petitioner be permitted to conduct metallurgical testing on Exhibit D-31 and alleged that this type of testing, i.e., metallurgical, would reveal the spurious nature of the Exhibit. After

31. 150 F.Supp. 157.

32. 150 F.Supp. 158.

conferences in Chambers, Judge Connally agreed that an investigation on the Exhibit would proceed on a step-by-step basis as various matters and facts were brought to light. In initially granting the right to examine the Exhibit, Judge Connally said he would withhold until later a decision as to metallurgical testing. The Exhibit was thereafter extensively measured and photographed by experts for both parties. Humble had an aluminum model of the Exhibit constructed and petitioner's experts constructed numerous wooden cone models and devices for demonstrating his theory relating to the alteration of the Exhibit. In short, many thousands of dollars and many hours were expended on examination of this Exhibit.

Then Petitioner filed in the lower court on June 6, 1969, a Motion to Allow Further Testing (A. 813-18). In that Motion the petitioner set forth strong evidence of alteration of the Exhibit and specifically set forth certain tests, including metallurgical tests, which could be made upon the Exhibit in a fashion so as to present its alleged historical value. Petitioner asserted in that Motion that such metallurgical and other testing would be dispositive of its allegation of fraudulent alteration. That motion was denied by Judge Connally. This court's attention is also directed to petitioner's Report on Exhibit D-31 (Rec., pp. 1234-1250) submitted to Judge Connally on May 16, 1969, in which petitioner set forth in detail the manner in which the Exhibit had been altered from its original construction, as suggested by the limited examination permitted as of that date.

Notwithstanding the information at the court's disposal, the court denied any further testing of the Exhibit and ordered this matter to trial. Thereafter, on June 13, 1969, appellant filed a Motion to Continue The Trial Date

(Rec., pp. 1337-1348) stating as one of its principal reasons that it had not had sufficient time to evaluate the recently received Hughes Tool Company documents and exhibits and to notice and take depositions of a number of Hughes Tool Company employees, all in connection with Exhibit D-31. This motion was denied by the court and petitioner was forced to call a number of Hughes Tool Company employees to the stand as witnesses without having the benefit of the preliminary discovery so essential in a matter of this type. During the course of the trial, certain Hughes Tool Company employees were placed on the stand and rapidly examined as to their knowledge concerning the Exhibit and related matters.

At the conclusion of petitioner's testimony on Exhibit D-31, petitioner, through its counsel, made a statement to the court, found at pp. 708-710 of the Trial Transcript (Rec., pp. 708-710). The petitioner felt, at that time, that it was unable to state to the court that it could prove by a preponderance of the evidence its contention relating to this Exhibit. The required proof would have been that the Exhibit was not only fraudulently altered, but that such alteration was made at the request of, or with the knowledge of, Humble. It appeared to petitioner at that juncture that a mere showing of the alteration of the Exhibit without connecting Humble therewith would be a meaningless act, Hughes Tool Company was not involved in the litigation. Judge Connally clearly understood the statement and replied to counsel that he would consider the matter and rule on the waiver of withdrawal of the issue at a later time.

Judge Connally's ruling is embodied in his Judgment wherein he has awarded costs and expenses relating to

the examination of the Exhibit to Humble. Under the circumstances outlined herein, appellant submits to this court that at no time did appellant mislead the lower court and the basis of appellant's request for examination of Exhibit D-31 was apparent to both parties and to the court. The request was based, as stated earlier, upon the opinion of Mr. Kinnear. The court was also aware from the beginning that appellant's assertion that it could prove alteration were predicated upon certain metallurgical testing.

The record on appeal contains the depositions of the parties' respective experts. Appellant cited these depositions to the lower court during oral argument on the effect of its waiver to show that the evidence before the court proved that the Exhibit had been altered at some period in time from its original conformation, and that the Exhibit had never been utilized in well drilling after its alteration. Appellant's expert testified that the cones on the Exhibit were not the originals and that the original cones had been larger (Dep. Dawson - P's Tr. Ex. #112, (A. 486)).[33] Additionally, Humble's expert, Mr. Noble, testified that the cones presently existing on the Exhibit were not the original cones and that the original cones had been larger, and that the Exhibit in its present form had not been in service (Dep. Noble - P's Tr. Ex. #143, (A. 537)). The only questions then remaining were when and by whom the alterations had taken place. Upon this the experts differ. Judge Connally found that the Exhibit had remained unchanged since 1920 to the

33. The size of the cones on Exhibit D-31 is crucial to its significance in the trial of C. A. 2363. Larger cones than those presently found on D-31 would block the fluid courses, diffuse the fluid stream, and strip D-31 of any claim as prior art to the Kinnear patent.

present (A. 847, Item 4). This finding was erroneous since it was based upon the oral testimony of the former Hughes Tool Company employees to the effect that they saw the Exhibit in 1920 and that they had no personal knowledge that it was changed after 1920. This certainly does not preclude the reasonable hypothesis that the Exhibit was changed after 1920. It merely demonstrates that those witnesses had no knowledge of such change. Appellant's expert was of the opinion, and the lower court was so advised, that the requested metallurgical examination could fix the date of alteration with reasonable precision and beyond dispute.

It must be concluded by this court that it was error for the lower court to permit the commencement of certain examinations and then stop short of permitting the metallurgical examination which was requested in the first instance. It is clear that this completely compromised petitioner's position on the assertions of alteration and it is, therefore, at the very minimum, inequitable to assess costs and expenses against this petitioner. Therefore, this court is asked to reverse that part of the judgment allowing costs and expenses to Humble in connection with the examination of Exhibit D-31.

IV. The Lower Court's Injunction on Future Proceedings

In its judgment, the lower court has enjoined the petitioner, its officers, stockholders, directors and attorneys and all other persons in active consort and participation with them, from further raising or litigating in any court any of the issues presented in the proceeding in the court below, including those actions between the parties numbered C. A. 64-H-354 and C. A. 63-H-509.

The instructions to the lower court concerning the conduct of its proceeding was contained in Chief Judge Brown's opinion written after the *en banc* hearing. The lower court was authorized to proceed to hear the evidence on the issues outlined in Judge Brown's opinion and nowhere was the lower court authorized to grant injunctive relief. On the other hand, nowhere was the lower court asked by Humble to grant injunctive relief. In short, petitioner asserts to this court that because of the peculiar nature of this proceeding, the lower court was without authority or jurisdiction to enter injunctive relief against the petitioner.

Petitioner does not believe it should be precluded from pursuing, in an appropriate court, any relationship or connection between Humble and Judge Cecil which is in addition to those precise factual questions litigated below. Particularly the injunction must not limit petitioner's further investigation into the authenticity of Exhibit D-31, should petitioner ultimately receive a new trial through this proceeding. It could be anticipated that in any such new trial Humble would attempt to again utilize Exhibit D-31 as evidence, and it should not be able to do so with inpunity. Every exhibit must be subject to attack.

Obviously, under those circumstances, petitioner would ask for, and in this petition does ask for, permission to conduct metallurgical tests on that exhibit in the event that a new trial is ordered.

Accordingly, the injunction should be lifted by this court or, at the very least, modified to the extent that it is clear that should any totally new factual matters unrelated to those factual matters litigated below arise in the future, they may be brought to an appropriate court's attention. Further, that in the event that D-31

should ever be introduced into evidence in any court of law that it be subject to the same challenges and exceptions of any other proffered evidence.

V. Humble's Fraud and Conspiracy— Exhibit D-31

In APPENDIX B-7 attached is a motion with attachments of One Sheet of machine shop drawing made by Brown & Sharpe Mfg. Co., of Providence, R. I., dated Jan. 6, 1909. Also attached is the front page of One (1) Sheet of the Patent Drawing of Howard R. Hughes, U. S. Patent No. 959,540, filed March 27, 1909 and issued May 31, 1910 of a 3-Cone bit. First Sharp-Hughes Tool Co., of Houston had 3-cone bits made from Brown & Sharpe Mfg. Co., machine shop drawing at Houston Car Wheel Co., at their Houston, Texas plant and machine shops. There is also an Affidavit of Eddie R. Kehrer, retired head of Machine Shop Operations of Mobil Oil Co. plant at Beaumont, Texas. Mr. Kehrer states in his Affidavit of June 13, 1971 that he made the first 3-cone bit for Sharp-Hughes Tool Co., in the year 1909. This is newly discovered evidence. Mr. Kehrer after making 2 and 3 cone roller rock bits for Sharp-Hughes Tool Co., as machinist for Houston Car Wheel Co., was employed by Mr. Howard R. Hughes, Sr., of Sharp-Hughes Tool Co., of Houston, Texas, and was the head of the Tool and Die Shop that made all new experimental type bits and changes in bit designs for Sharp-Hughes Tool Co., and its successor Hughes Tool Co. up to the end of the year of 1918. Mr. Kehrer is a man of great distinction and ability in the practice of machine arts and is an unbiased witness who states unequivocally that Sharp-Hughes Tool Co., up till 1916-17 and thereafter its successor Hughes Tool Co., only made 2 and 3 cone roller rock

bits with water course through the bit body so that the terminating ends thereof would direct fluid (drilling mud or the like) *to hit directly upon the top of the cones.* That the Brown & Sharpe Mfg. Co. machine shop drawing attached to his affidavit was of such design, so that the fluid would hit the top of the cones for a 4 inch bit of Howard R. Hughes, Sr., and that this was the Hughes design of all 2 and 3 cone bits made by the Hughes organizations from 1909-1918. That at no time during said periods mentioned did the Hughes organization make 2 or 3 cone roller rock bits so that the fluid would be directed by the fluid course ducts drilled through the bit body *to direct fluid between the cones* and *hit directly on the outer bottom portion of the well hole* as is done by what is known in the drilling industry as a "jet type bit".

Mr. Floyd L. Scott in his oral testimony in the original Suit C. A. No. 2363 testified before Judge Lamar Cecil as Judge of the U. S. District Court for the Eastern District of Texas, stated that the old 3 cone bit D-31 was made from the Brown & Sharpe Mfg. Co., machine shop drawings of Brown & Sharpe Mfg. Co. who made all of the drawings from which Sharp-Hughes Tool Co. made their 2 and 3 cone roller rock bits in the 1910-1912 era. Now Hughes Tool Co. at the eleventh hour produced the Brown & Sharpe Mfg. Co. machine shop drawing, a copy of which is attached to the Kehrer Affidavit. This machine shop drawing is what Mr. Floyd L. Scott of Hughes Tool Co. says they had in their files and the drawings were made by Brown & Sharpe Mfg. Co., and from which 3 cone bits were made by and for Sharp-Hughes Tool Co. (See Scott Trial Testimony R.____). Mr. Kehrer identifies this drawing from which he as a machinist made 3 cone roller rock bits at Houston Car Wheel Co., first for Sharp-

Hughes Tool Co. in 1909, and, later in 1910-12 for Sharp-Hughes Tool Co. as a machinist and supervisor of their Tool and Die Department. This is conclusive since Hughes Tool Co. produced the Brown & Sharpe Mfg. Co. Jan. 6, 1909 machine shop drawing from which they made their 3 cone bits. It is likewise obvious that no bits such as D-31 3-cone roller rock bits were made with water course drilled through body of bit by Brown & Sharpe Mfg. Co. machine shop drawings so that the fluid would be directed to hit directly on the outer bottom portion of the well hole without hitting any part of the steel structure of the bit. The latter is the design of "jet type bits". The testimony of Mr. Floyd L. Scott corroborates that of Mr. Kehrer. Mr. Scott was thought to be the oldest living employee of the Hughes organization until Mr. Kehrer voluntarily gave the newly discovered evidence to Counsel for Petitioner on June 13, 1971. The attached Hughes patent shows application for U. S. Patent on March 27, 1909 some three (3) months after the Brown & Sharpe Mfg. Co. machine shop drawing was made and dated Jan. 6, 1909. This patent to Howard R. Hughes, Sr., issued into U. S. Patent 959,540 and shows the same design of the water or fluid course ducts drilled through the bit body of the 3-cone bit as that of the Brown & Sharpe Mfg. Co. machine shop drawings. That is, so that the fluid is directed by the terminating ends of the fluid course ducts 17 (3 in number) *to direct the fluid to hit on top of the 3 cones* and *not miss the 3 cones and hit directly on the outer bottom portion of the well hole.*

The *design of the fluid course ducts* designed *to direct the fluid to hit directly on the outer bottom portion of the well hole* and not to hit any of the roller cutters is the grant in claims awarded to C. W. Kinnear in his Patent No. 2,380,112 and Re-issue thereof No. 23,416,

issued July 10, 1945, U. S. Application therefor filed Feb. 2, 1941. Suits were brought by Kinnear-Weed Corp. in April 6, 1953 against Humble, then Hughes Tool Co., and then other oil companies and bit manufacturers. This mysterious bit D-31 was made by Hughes Tool Co. and used by Humble as prior art to defeat the Kinnear patent for the "jet bit" in the trial of C. A. No. 2363 in February through April 1, 1955 in the U. S. District Court for the Eastern District of Texas, Beaumont Division. This mysterious bit D-31 was not made back in the 1910-1912 era as shown by the Kehrer Affidavit. Mr. Floyd L. Scott went to work for Hughes Tool Co. in the year 1917. Yet, he says the Brown & Sharpe Mfg. Co. machine shop drawings were used to make 3 cone roller rock bits in the 1910-12 era, based upon the fact that Hughes Tool Co., successc · to Sharp-Hughes Tool Co., had it in their files and finally produced this drawing attached to the Kehrer Affidavit. The Supreme Court is the only court that can give petitioner justice in this case by recognizing the Kehrer Affidavit for what it is. Please give it the credence it deserves so that petitioner can have One (1) fair day in Court. This finding out of this newly discovered evidence by the voluntary statements of Mr. Kehrer to Counsel for Petitioner is what I call "Godsent" for it is the basis upon which justice will finally be given to petitioner. Petitioner has fought on in this case for 18 long years knowing it was right in this cause. These enduring years have been well spent when at last justice can work its wonders to behold. Petitioner believes in the fair administration of justice, and, has been steadfast in its vigil to bring this litigation to a fair and lasting end. This cause has been presented on the issue of D-31, being Plaintiff's Exhibit No. 110 in the present case before this Court.

Now, at last when Petitioner has produced evidence to clearly show that D-31 is a fraudulent exhibit introduced in C. A. No. 2363 by Respondent. The Humble Company and its employees are bound and vouch for its genuineness, and, after all of this tortious seeking and finding out by Petitioner that D-31 is a fraudulent exhibit has brought this fact to light. Then, after all of that after Humble and its employees and attorneys had access to the Brown & Sharpe Mfg. Co., drawings before Petitioner finally got to see the drawing on June 10, 1968, only 13 days before trial of 68-H-40 before Judge Connally in the District Court For the Southern District of Texas. At such trial Humble defended D-31 as genuine knowing it was a fraudulent bit. Defending it as an authentic and genuine bit with Hughes Tool Co. witnesses. It is the worst brand of perjury and sub-ordination of perjury that this world has ever seen. These Humble people are before this court with unclean hands, and should be so treated. Petitioner has done its work and presented its case without falsehoods and in good faith. It is entitled to relief which it seeks. This Supreme Court is called upon to reverse this case and grant further standard chemical and metallurgical tests of the metal of D-31 to forever, put D-31 to rest. It is a fraudulent bit. Please give the Petitioner its final just rights and strike down these fraudulently begotten judgments of Respondent.

If 28 U.S.C. is void, then petitioner brings to its aid the U. S. Supreme Court of the United States in its interpretation of the "due process of law" clause of the Fifth Amendment of the U. S. Constitution to show that Judge Cecil was disqualified to sit in C. A. 2363. The Supreme Court has heretofore in *Tumey v. Ohio, Offuts*

v. U. S. and *In Re Murchison,* infra, held that a judge is disqualified to sit in cases having an interest in the outcome of the case, bias, prejudice, relationships and connections with a party to a suit in its interpretation of the "due process of law" clause of the Fourteenth Amendment of the U. S. Constitution. There is no difference in the wording of the "due process of law" clause, as such, in the Fifth or the Fourteenth Amendments to the U. S. Constitution except that the Fifth relates to rights between persons and the Fourteenth relates to rights between persons and the States of the United States. Since there is no difference in the wording of the "due process of law" clause in both the Fifth and Fourteenth Amendments to the U. S. Constitution it would appear that the Supreme Court would logically give the same interpretation to the "due process of law" clause in disqualifying a judge to sit in a case violating the "due process of law" clause in the Fourteenth Amendment as that stated in the Supreme Court cases cited above. Therefore, if 28 U.S.C. Sec. 455 is void, for being indefinite and uncertain as to meaning, then, the constitutional guarantee of the "due process of law" clause of the Fifth Amendment will certainly disqualify Judge Cecil and all of the other Judges who has sat in C. A. No. 2363 or appeals or other proceedings therefrom.

VI. Judge Cecil Illegally Denied Jury Demand

The trial Judge Lamar Cecil did deny written Jury Demand in C. A. No. 2363. The record clearly shows that Petitioner-plaintiff in the original suit before him after Petitioner-plaintiff filed Amended Complaint on January 14, 1955 did file thereafter on January 14, 1955

and serve upon Respondent-defendant Humble a copy of the written jury demand. On January 17, 1955 C. A. 2363 came on for trial at the appointed date of its setting for hearing on the docket of said court with notice to all parties. The said District Judge Lamar Cecil denied Petitioner-plaintiff trial by jury upon which it insisted in open court on said date of January 17, 1955.

The record in this case bears out the above stated facts. The Amended Complaint was so amended that there were fact issues of law triable by jury such as patent infringement. Yet, the Trial Court denied trial by jury in violation of the Seventh Amendment to the Constitution of the United States, and Rule 38 of the Federal Rules of Civil Procedure. Upon this issue the Supreme Court is respectfully requested to come to the aid of Petitioner and grant new trial on this issue alone.

There are so many important issues in this case to which Petitioner is entitled to relief because of the fact that this case is steeped in error and fraud and conspiracy to practice fraud by the conspiring together of the employees of Humble and Hughes. Relief must at long last be forthcoming. The inventor C. W. Kinnear has made it possible to keep down the high cost of drilling for oil and gas. If it were not for his great invention of the "jet bit" and making it work the gasoline and oils upon which America and the whole world depends would be so high that such products could not be widely used. When you drill up to Five (5) times faster with "jet bits" on which the Patent Office granted him the only patent awarded on such type bits you then realize a five times savings in drilling deep wells. The importance of this invention is measured by its worth to mankind.

VII. Is 28 U.S.C. Sec. 455 Void as Being Indefinite and Uncertain as to Meaning

While petitioner has made extensive arguments utilizing 28 U.S.C. Sec. 455 regarding the disqualification of the District Judge Lamar Cecil who sat and rendered judgment in C. A. No. 2363, it may be that such Statute is void for being indefinite and uncertain as to meaning. The question of 28 U.S.C. Sec. 455 is a jurisdictional one.

The reasons why petitioner contends that 28 U.S.C. Sec. 455 Statute is void and invalid for being indefinite and uncertain as to meaning is because of the first clause of said Statute, which reads as follows:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a *substantial interest* * * *".

1. There is no guide lines set forth in said statute or by which a judge may determine what the meaning of the words "substantial interest" is, with any certainty, upon which a judge may determine his qualifications.

2. It leaves to the judge the right to determine any kind of interest he may have, whether the interests he might have with one of the parties to a case, and, whether he should disqualify himself, or, not disqualify himself, which is speculative, and therefore would allow any judge, if valid, to determine whether or not his interest, with a party to a suit, if any, is a *substantial interest.*

That may be the reason for the unusual circumstances why some District and Circuit judges in the Fifth Circuit who own or control wide and various interest with party litigants have not disqualified themselves in this case. For example, in the *Kinnear-Weed Corporation v. Humble Oil And Refining Co.* case C. A. No. 2363, Judge Lamar Cecil sat in said case owning 100 shares of the stock of Humble valued at some $9276.75 the sales market price as of January 21, 1955. Judge Connally said in Misc. 68-H-40 in the U. S. District Court For the Southern District of Texas and stated by his letter dated December 19, 1968 that his wife owns 38 Shares and also owns One-half (1/2) interest as remainder-man in 602 shares of Standard Oil Co. (Incorporated in New Jersey). The value of 38 plus 301 shares or 339 shares of Standard Oil Co. of New Jersey at the date Judge Ben Connally took over case 68-H-40, at market price, would be an estate of his wife in said 339 shares of stock to amount to some $25,000.00 Dollars. Standard Oil Company (New Jersey) owned all of the stock of Humble and is a party to said suit in 68-H-40 then and now.

Chief Judge John R. Brown of the Fifth Circuit Court of Appeals owned and/or was Trustee of stock at the time he sat as Chief Judge in the *en banc* Court of the U. S. Court of Appeals For the Fifth Circuit Appeal No. 29,103 and owned the following common stocks as follows: 365 shares of Gulf Oil Corp., @ $78.5 Dollars per share; or, app. $27,652.50; 27 shares of stock of Tenneco, a subsidiary of Standard Oil Co. (N. J.), and 375 shares of stock of Houston Natural Gas Production Co., a subsidiary of Standard Oil Co. (N. J.) whose market value was not known to petitioner at the time Chief Judge Brown sat in the case but thought to be of the

value amounting to approximately the same value of Gulf Oil Corporation stock, some $30,000.00 Dollars. These Standard Oil Co. (N. J.) subsidiaries and Gulf Oil Corp. being either a party at interest in said suit or in the case of Gulf Oil Corp. a defendant is a suit involving the same question of patent infringement as Humble and Standard. Chief Judge, Brown at the time he sat in said *en banc* suit in Appeal No. 29,103 was Trustee for two trusts which owned 39 and 94 shares of Standard Oil Co. (N. J.) and 188 and 438 shares of Houston Natural Gas Production Co., a subsidiary of Humble and Standard, and 175 shares of Standard of Indiana. This personally owned stocks and Trustee stocks of the party Standard Oil Co. (N. J.) amounts to some 1336 shares of common stock worth approximately $75,-000 to $100,000 Dollars.

Circuit Judge Irving L. Goldberg personally owned some 400 shares in Gulf Oil Corp., Mobil Oil Co., Sinclair Oil & Gas Co. (a subsidiary of Standard Oil Co. (N.J.), and Texaco, Inc., Colonial Gas Co., Delhi-Australia Co., and Delhi-Contract Unit; and, Trustee in Four Trusts which owns oil company stocks of Gulf, Texaco, Shell, Royal Dutch Pet. Co., Marathon Oil Co., American Natural Gas Co., Arkansas Louisiana Gas Co., Pennzoil United, Inc. and Dow Chemical Co. amounting to some 4294 Trust shares. All aggregating approximately the value of some $300,000 Dollars or more.

Circuit Judge David W. Dyer and family own some 531 shares of oil company stocks in American Natural Gas Production Co., Shell Oil Co., Texaco, Gulf Oil Corp., and Tropical Gas Co., being of the approximate value of $25,000 Dollars or more.

Circuit Judge Robert A. Ainsworth has substantial monthly royalty payments from Gulf Oil Corp., Union Producing Co., and Pan American Pet. Corp. as per his statement, the amount of which was not disclosed but he used the word "substantial".

Circuit Judge John Minor Wisdom and family is thought to have Standard Oil Co. (N.J.) common stock, the exact amount of which is unknown to petitioner. He not only sat in the *en banc* hearing in Appeal No. 29,103, but was one of the panel of three judges who sat in Appeal No. 16,780, the original appeal from C. A. No. 2363 on the merits of the entire case in 1957.

Circuit Judge Warren L. Jones sat in the Appeal No. 16,780, the original appeal on the merits from C. A. No. 2363. He stated in the case of Austral Oil Company, et al. v. Federal Power Commission in Appeal No. 27,492, et al., being known as the Southern Louisiana Area Rate Cases, along with Chief Judge John R. Brown and Circuit Judge Carswell. Judge Warren L. Jones made disclosure during hearing on Oral Arguments in that case that he was Trustee with others as trustees and later disclosed that he had some 13,010 shares of oil and gas company stocks with parties to said suit. It is thought said stocks are valued at approximately $600,000 Dollars. Chief Judge John R. Brown disclosed he owned and was Trustee of some 2342 shares of oil and gas company stocks, whose value is unknown to petitioner, but thought to amount in value to some $100,000 Dollars or more.

None of the above named District and Circuit Court Judges disqualified themselves in the Kinnear-Weed Corp. v. Humble Oil And Refining Co. litigation above mentioned, yet, 28 U.S.C. Sec. 455 states they "shall" dis-

qualify themselves if they have a "substantial interest" with a party in a case. Humble and Standard Oil Co. (N.J.),was and is, a party in the Kinnear-Weed Corp. v. Humble, et al. cases.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted. Oral argument is respectfully requested, and petitioner respectfully prays that this Court reverse the judgments of the Court of Appeals and both district courts below and enter judgment for petitioner:

1. granting a new trial in C. A. No. 2363;

2. awarding damages to petitioner for the fraud of Humble, including petitioner's expenses incurred in this abortive trial caused by Humble and reasonable attorneys fees incurred in the prosecution of this case for 18 years from the commencement of this case;

3. permit further and complete chemical and metallurgical testing of Exhibit D-31;

4. grant such other and further relief to which petitioner is entitled.

Respectfully submitted,

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By_____
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By_____
William E. Kinnear
Counsel for Petitioner

Dated: September 13, 1971

CERTIFICATE OF COUNSEL

I, William E. Kinnear, Counsel for Kinnear-Weed Corporation, Petitioner in the above entitled case, hereby certify that the above and foregoing, PETITION FOR WRIT OF CERTIORARI, and referenced TRANSCRIPT OF RECORD, and APPENDIX are presented in good faith, and not for the purpose of delay, restricted to the grounds therein specified but in the opinion of counsel, well founded in law and proper to be filed herein.

William E. Kinnear

PROOF OF SERVICE

I, William E. Kinnear, Counsel for Kinnear-Weed Corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of September, 1971, I served copies of the foregoing PETITION FOR WRIT OF CERTIORARI and APPENDIX, by mailing the required copies in duly addressed envelopes by U. S. Mail, postage prepaid to: Mr. Garrett R. Tucker, Jr., Esq., One Shell Plaza, Houston, Texas 77002, and Mr. C. O. Ryan, Esq., Gulf Building, Houston, Texas 77002.

William E. Kinnear
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Counsel for Petitioner

APPENDIX A-1

CONSTITUTION OF THE UNITED STATES AMENDMENT V

"* * *, nor be deprived of life, liberty, or property, without due process of law; * * *."

APPENDIX A-2

CONSTITUTION OF THE UNITED STATES AMENDMENT VII

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

APPENDIX A-3

TITLE 28, U.S.C., FEDERAL RULES OF CIVIL RULE 38. Right of Jury Trial.

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party. * * *".

APPENDIX A-4

TITLE 28 U.S.C. 455, FEDERAL RULES OF CIVIL PROCEDURE

28 U.S.C. 455. "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein."

APPENDIX B-1

[1]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 16780

KINNEAR-WEED CORPORATION,
Petitioner-Appellant,

versus

HUMBLE OIL & REFINING COMPANY,
A Texas Corporation (Now dissolved and merged into Standard Oil Company, a New Jersey Corporation) its successor and/or surviving corporations and its assigns,
Respondent-Appellee.

ON PETITION FOR REHEARING EN BANC

(October 15, 1968)

Before: Brown, Chief Judge, WISDOM, GEWIN, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER and MORGAN, Circuit Judges*

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* Judges Bell and Simpson, though active members of this Court, recused themselves and did not participate in the hearing or determination of this cause, nor did Judge Clayton because of intervening illness. Senior Judges Rives, Tuttle and Jones, each of whom had some contact with the case in its earlier or present posture likewise recused themselves which made it unnecessary for the Court to determine the question raised by its sua sponte as to the competency of Judges Rives and Jones to sit. See Allen v. Johnson, 5 Cir., 1968, 391 F.2d 527 (en banc).

[2] BROWN, Chief Judge: This is an extraordinary petition[1] in which Petitioner[2] seeks to set aside the judgment of the Trial Court entered in 1956, holding a patent invalid and not infringed. That judgment was affirmed by this Court in 1958, with subsequent modification in 1961.[3]

The attack on the judgment of[4] September 1956 is based upon the claim that the Trial Judge was disqualified by reason of business transactions and relations with the patent-suit defendant, Humble,[5] amounting to a "substantial interest" within the meaning of the disqualification statute[6] or other appropriate [3] legal principles. Col-

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1. In the unpublished order putting the case en banc we simply quoted from the petition and its prayer. We declined there, and now, to characterize it further. That portion of the order is reproduced as Appendix A to this opinion.

2. Kinnear-Weed Corp.

3. Kinnear-Weed Corp. v. Humble Oil & Ref. Co., E.D. Tex., September 28, 1956, 150 F.Supp. 143, *aff'd*, 5 Cir., September 22, 1958, 259 F.2d 398, *cert. denied*, 1959, 361 U.S. 903, 80 S.Ct. 210, 4 L.Ed.2d 158, *modified*, 5 Cir., May 17, 1961, 296 F.2d 215, *cert. denied*, 1961, 368 U.S. 890, 82 S.Ct. 142, 7 L.Ed.2d 89.

4. We phrase this broadly to include all gradations in the relief sought. (See Appendix A). These include requests that we render judgment at this time, on the former trial record, declaring the patent to be valid and infringed, or that we order a new trial of the merits of the patent litigation, or that we grant any of a whole host of variables in between.

5. Humble Oil & Refining Co.

6. The statute provides:
Interest of justice or judge
"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." June 25, 1948 c. 646, 62 Stat. 908. 28 U.S.C.A. §455.

lateral to, but claimed to be independent of, the attack on the judgment, Petitioner also seeks various types of relief including damages, actual and punitive, attorney's fees, etc., from Humble, based upon fraud both on the District Court and on the Court of Appeals for the Fifth Circuit. Petitioner claims that the Trial Judge was disqualified because of substantial financial interest in the litigation arising from these four incidents, considered singly or in combination: [1] ownership by the Trial Judge of 100 shares of Humble stock, [2] the relationship between Humble and Coastal Tool Co., Inc., a service company in which the Trial Judge had a 25% stock ownership, served as director and secretary-treasurer, and from which he received both dividends and salary, [3] the settlement and disposition of the Beck suit brought against Humble (as the lessee) by owners of mineral interests, including the fractional share (1/320th) of the Trial Judge who was a named plaintiff, and [4] leases, options, and releases between Humble, on the one hand, and members of the family of the Trial Judge's wife in the Sabine Tram Lands.[7] [4] Petitioner asserts that the uncontradicted facts as to [1], together with the uncontradicted facts as to any one or more or all of [2], [3], or [4], entitle it as a matter of law—at this time and at the hands of this Court—to the relief here sought without the necessity for any further factual inquiry by this Court,

7. Prior to the argument of these cases en banc the members of this Court revealed to counsel for the parties their (a) ownership of stock in the Humble Oil—Standard of New Jersey Complex; (b) ownership of stock in other major oil companies against whom there is litigation now pending by Kinnear-Weed, and (c) ownership of oil and gas leases, royalty interest, or similar mineral interests under contracts or conveyances to which oil companies in (a) or (b) are parties. All counsel thereafter expressly waived any objections they might have had to the qualification of the Judges constituting this Court.

a panel thereof, a Special Master acting for it, or by a District Court for handling by it either as an original suit or as a reference to it from the Court of Appeals.

Following an earlier submission of this case to a panel of three Judges, which rendered no decision, this Court, on its own motion, set the matter down for reargument and determination by the Court en banc. We have had extensive briefs and extended oral arguments before the Court en banc. Because our disposition of the case for factual inquiry and determination by the District Court of the almost limitless factual disputes which have so far never been judicially resolved, we think it unnecessary and inappropriate to discuss any of these things in detail lest what we say might lead the District Court to believe that we had formed, or intimate, judgments, either factual or legal, on them.

Several matters, however, are decisive and can be briefly stated at the very outset. The first is that, contrary to Petitioner's assertion, this record does not contain uncontradicted facts with respect to [2], [3], or [4], singly or in cumulation which require, or permit, [5] this Court to determine now as a matter of law, fact, or both, that the Trial Judge was disqualified. Thus the relief sought (see note 4, supra) cannot be granted by us on this record at this time. Nor does the present record show facts requiring, or permitting, this Court at this time to declare that Humble was guilty of fraud on this Court, the District Court, or both. We expressly decline to grant this relief.

At the same time we decline to accept Humble's plea of res judicata, which is based primarily on the historical fact that in 1960-61 Petitioner filed in this Court motions

which essentially sought to have the Trial Court's patent judgment set aside because of disqualifications of the Trial Judge for reasons [1] and [2], to which Humble made responses. Each of these reasons was set forth in considerable factual detail in the moving papers.[8] Humble contends that when this Court denied that post-affirmance relief sought on the [6] basis of disqualification of the Trial Judge for financial interest in the litigation, this action became insulated on familiar principles of res judicata, since neither the basis for this Court's action (untimeliness) nor the later addition of added factual details would be of any significance. But, as we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. Whatever might be the usual consequences of res judicata, collateral estoppel or doctrines akin to them, we reject them here. They are not a bar or defense here or below.

We are equally clear that neither standing alone nor in combination with any one or more or all of [2],

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8. The papers filed Dec. 27, 1960 were characterized by Petitioner as a "Motion To Open Case, Reverse, Vacate and Set Aside Judgments, Recall Mandate, Grant New Trial, Order Damages, Costs, Expenses, Attorney's Fees and other Relief for Appellant and against Appellee on Grounds of Fraud, the Disqualification of the District Judge and Unclean Hands of Appellee, Misrepresentation, Misconduct, Etc." This had been preceded by like motions in the Supreme Court.

On March 4, 1961 Petitioner filed another motion in this Court styled: "Motion on Newly Discovered Fraud, Misrepresentation and Misconduct Practiced upon Appellant and upon the United States Court of Appeals for the Fifth Circuit by Appellee, Its Executives, Agent and Attorneys and/or [the Trial Judge's Wife]."

Petitioner's present charge against Humble for fraud practiced by Humble on the Court of Appeals is based primarily on what its claims were obvious deficiencies in the response made by Humble to these motions.

[3], or [4], item [1] the ownership of 100 shares of Humble stock is not, and was not, either as a matter of law or fact or both a disqualifying factor. The record shows without contradiction that the 100 shares owned by the Trial Judge[9] were an infinitesimal portion of 36 million shares outstanding when the case was tried. This stock had been owned for a long time prior to the time the Trial Judge took his oath (September 9, 1954). The Trial Judge informed his wife that the stock would have to be sold as he would be handling matters in which Humble was a litigant. The stock was sold on January 17, 1954, within a few months after his accession, during which interval he had han-
[7] dled some preliminary matters in the patent case.[10] Petitioner presses hard upon us the early decision of the Ninth Circuit in In re Honolulu Consolidated Oil

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9. We believe the facts require holding that the stock belonged to the Judge's wife, but we regard this as immaterial and treat it as though he had either sole or community ownership of it.

10. This is a graphic chronology of actions taken. September 9, 1954—Trial Judge took oath.
October 4, 1954—First pretrial conference in CA 2363.
October 6, 1954—Order granting in part and denying in part Defendant's motion for proper answers to interrogatories.
November 12, 1954—Second pretrial conference.
November 12, 1954—Order overruling in part and sustaining in part Defendant's objections to interrogatories.
December 8, 1954—Plaintiff's first motion requesting jury trial filed.
December 20, 1954—Order granting Defendant's motion for discovery.
January 8, 1955—Plaintiff's motion for default judgment filed.
January 10, 1955—Order denying Plaintiff's first request for jury trial.
January 14, 1955—Plaintiff's second jury demand filed.
January 17, 1955—Order denying Plaintiff's second request for jury trial.
January 17, 1955—Stock sold.

Co., 9 Cir., 1917, 243 F. 348. We do not regard this case as controlling for a number of reasons. First, the disqualification was asserted well in advance of trial. Second, that case arose under the predecessor statute[10a] which defined the prohibited relationship be-
[8] tween the Judge and the litigation as one in which he was "in any way concerned in interest" rather than the present statute (see note 6, supra), which has the far different term "substantial interest." This tiny fractional interest in the equity ownership of this huge industrial enterprise does not amount, either as a matter of fact, or law, or both, to a substantial interest by the Trial Judge in the case or a prohibited connection with a litigant. The fact that the Trial Judge insisted that the stock be sold neither makes it substantial nor indicates a conscious awareness that he had a relationship to the litigant which was improper or disqualifying.

We think, however, that there should be a factual, judicial determination of the facts with respect to [2], [3], and [4]. We cannot emphasize too greatly, however, that since our approach in this case is one in which the interests of justice transcend those of the

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10a. Judicial Code (Act of March 3, 1911, C.231) §20, 36 Stat. 1090. (Emphasis added.)

"Whenever it appears that the judge of any District Court is in any way *concerned in interest* in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior Circuit Judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

parties, this action of ours is not to be interpreted as a holding, either express or implied, that a "prima facie" case had been made out. Nor do we suggest even a remote possibility of a whisper of a suggestion as to how any one or more or all of these issues ought to, or must be decided. We are impelled by an abundance or perhaps an overabundance of judicial concern and public policy to order further hearings in this cause, but we disagree with our dissenting brethren only as a matter of degree.

Without even remotely suggesting what the facts or their significance may be, a brief mention of grounds [3] and [4] is illustrative. The Beck lawsuit in the [9] State Court alleging nondevelopment of minerals, tried in the Spring of 1954, ended in a hung jury. In October of 1954 those actively in charge of the litigation for the mineral owners had worked out a settlement in which Humble was to pay $5,000 to defray the Plaintiffs' costs (and perhaps some of the attorney's fees incurred by them). The settlement was accepted December 21, 1954 with the money being paid on February 21, 1955. The share of the Trial Judge was $409.24. In the interim the Trial Judge on January 10, 1955, had denied Petitioner's first motion for a jury trial. There is an innuendo, but nothing more, that since historically production increased on this lease subsequent to that settlement, there must have been "something more" to the settlement.[11] Item [4] does not even enter the picture until after the Trial Judge

11. This record is largely a battle of affidavits. Humble's response shows without factual contradiction of any kind that these increases in production were the result of formal orders of the Texas Railroad Commission under Texas proration statutes based upon specific geological or engineering factors.

had entered his findings of fact, conclusions of law and formal judgment.[12] The Sabine Tram Lands[13] is a large tract of some 80,000 acres purchased in 1937 by the Trial Judge's father-in-law and another wholly unconnected with the family. An undivided 1/12th in-
[10] terest was transferred to the Trial Judge's wife, and over a period of many years prior to the Trial Judge going on the bench, there had been numerous leases, releases, bonuses, and options between the co-owners of the lands, on the one hand and a number of oil companies, including Humble as but one of many. Nothing indicates that either the Trial Judge or his wife had anything to do with negotiation of the leases or management of the property. One of these transactions was a lease granted in November 1956 from which the Trial Judge's wife received in December of 1956 a substantial sum as her portion of the lease bonus paid by Humble.[14] But this same record upon which Petitioner boldly demands immediate and decisive relief shows that the payments of all of these bonuses, delay rentals, etc. were proportional to all other co-owners. And from an entire want of any other showing these appear to be routine arm's length

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12. The case was tried in the Spring of 1955 and after extended proposed findings of fact, counter findings of fact, amended findings of fact, etc., the Trial Judge entered findings of fact and conclusions of law on September 28, 1956. Final judgment was entered October 10, 1956. The motion for new trial was filed October 19, 1956, and was formally denied on January 7, 1957.

13. Petitioner insists because of commingling, these lands were, or became, the community property of the Trial Judge and his wife. Again we regard this as immaterial. (See note 9, *supra*).

14. This lease was executed two months after the Trial Judge entered his findings of fact and conclusions of law and two weeks after he had rendered final judgment, but five weeks before he overruled Petitioner's motion for new trial. (See note 12, *supra*).

transactions in which Humble was but one of many oil companies. In fact, 25 leases were granted to other operators prior to the November 1956 lease to Humble.

The same sort of analysis can be made of many phases of [2] Coastal since this record fails to even touch upon, among many other facets perhaps of equal significance, whether Humble at the time it tried the patent case knew that the Trial Judge had been and still was an owner, officer and director of Coastal, or whether the Trial Judge had any actual knowledge, [11] as distinguished from that which might be imputed to him from his director-officer-stockholder interests, that Coastal had significant dealings with Humble or that these were in any extent or nature less than routine, arm's length transactions in the normal course of business.

We therefore conclude that the interests of justice require that there be a judicial factual hearing and determination of the charges in and related to [2], [3], and [4] either singly or in combination. Obviously this Court is not equipped for this sort of determination, either acting en banc, by a panel, or by one Judge acting as an independent Special Master. This is the task for which a District Court is ideally suited. Consequently, we treat this extraordinary petition as one requesting leave[15] of this Court to proceed with a motion

15. See Bros, Inc., v. W. E. Grace Mfg. Co., 5 Cir., 1963, 320 F.2d 594, 607 n.32; Butcher & Sherrerd v. Welsh, 3 Cir., 1953, 206 F.2d 259, *cert. denied*, 1954, 346 U.S. 925, 74 S.Ct. 312, 98 L.Ed. 418; Geuder, Paeschke & Frey Co. v. Clark, 7 Cir., 1961, 288 F.2d 1, *cert. denied*, 1961, 368 U.S. 826, 82 S.Ct. 47, L.Ed.2d 30; Tribble v. Bruin, 4 Cir., 1960, 279 F.2d 424; Krock v. Electric Motor & Repair Co., 1 Cir., 1964, 339 F.2d 73, *cert. denied*, 1964, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298.

under F.R.Civ.P. 60(b) or, as permitted in Rule 60(b), an "independent action."[16] We think this [12] proceeeding should go forward without further delay since so much time has already elapsed subsequent to the date of the judgment and its earlier affirmance by us. The issues may encompass the charges showing fraud upon this Court. As to the extent that Petitioner undertakes to prove such facts as distinguished from fraud on the District Court, — especially with respect to the response made to the 1960-61 motions of Petitioner (see note 8, supra, and accompanying text) the District Court shall hear and determine and make findings of fact and conclusions of law on that feature of the case. After which, by appropriate steps, we can determine

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16. Rule 60(b)

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) * * * (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated instrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

whether and to what extent these are to be treated as the action of (i) a District Court serving as a Special Master, requiring our approval prior to their effectiveness, or (ii) simply as a District Court in which event such findings and conclusions would be reviewed as a part of any appeal.

[13] As substantially all of these same charges are made in litigation pending as original actions in the Southern District of Texas[17] we would leave to the District Court the question whether the proceedings authorized by this opinion may best go forward as a part of, or along with, those two cases or should be independently handled. Those cases, almost on the eve of the trial set for February 1967, were apparently voluntarily stayed by the Trial Court following Petitioner's formal motion to this Court to compel the District Court to stay further proceedings as well as similar motions filed in the District Court. Any such stays should be promptly vacated.

The Chief Judge of the United States District Court for the Southern District of Texas is directed to designate a United States District Judge to conduct the hearings and make the findings and conclusions herein ordered. This Court reserves jurisdiction to the extent as it may be necessary or appropriate for further and future orders by this Court.

We reiterate to the point of repetition that nothing we say or fail to say is to be taken as a possible suggestion of a whisper or remote intimation of how we feel any

17. They are: Kinnear-Weed Corp. v. Humble Oil & Refining Co., No. CA63-H-509 and Kinnear-Weed Corp. v. Humble Oil & Refining Co., No. CA64-H-354.

issue or issues should or must be decided or what kind or character of relief, if any, should follow in consequence thereof. All such matters are for the initial determination of the United States District Court [14] for the Southern District of Texas in accordance with this opinion.[18]

APPENDIX A

ORDER ON EN BANC

On May 18, 1967 Kinnear-Weed Corporation, describing itself as Petitioner-Appellant filed what it described as "Petition of Petitioner-Appellant" the opening portions of which (on pages 1 and 2) stated:

> "Petitioner-Appellant moves this Court to grant this Petition in all respects and to grant:
>
> "Amendment and enlargement of 'NOTIFICATION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE HONORABLE JUDGES THEREOF THAT THE JUDGMENT OF THIS CASE IS ILLEGAL AND THAT A CONTEST STILL REMAINS' filed by Appellant's assignee and ordered filed herein on January 13, 1960, so that the same be considered a petition for hearing [15] and determination by this honorable Court of fraud practiced upon it in Appeal No. 16,730; to vacate its judgment in Appeal No.

18. To enable the District Court to know what has been before this Court, as that might bear on the scope, nature, and extent of the remand proceedings for judicial factual resolution and legal determination, the parties, in collaboration with the Clerk of this Court, shall lodge with the District Court a complete copy of everything filed with, or presented to, this Court throughout the long history of this case. See Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F.2d 84, 103 n.67; Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104, 121 n.64.

16,780 and order the court below to set aside its judgment in Civil Action No. 2363; to order a new trial of the issues raised in Civil Action No. 2363; and to take such additional action as may be appropriate;

or in the alternative grant

"Petition for hearing and determination by this honorable Court of fraud practiced upon it in Appeal No. 16,780; to vacate its judgment in Appeal No. 16,780 and order the court below to set aside its judgment in Civil Action No. 2363; to order a new trial of the issues raised in Civil Action No. 2363, and to take such additional action No. 2363, and to take such additional action as may be appropriate;

or in the further alternative

"By this Court's own order investigate, hear and determine all aspects of fraud and/or conspiracy practiced upon it by Respondent-Appellee as set out herein and all other fraud and/or conspiracy it might uncover through a full investigation and hearing."

At the end of a 45 page brief in support thereof it concluded (page 46-47) with the following prayer:

[16] "WHEREFORE, YOUR PETITIONER PRAYS AS FOLLOWS:

"1. That this Court order a full oral hearing of the matters raised herein and use its power to bring before it all those involved or effected so that all of the facts can be known to it;

"2. That this Court enter a finding that the proceedings to date have resulted in a manifest injustice to the petitioner and a fraud upon the petitioner and all Federal Court involved;

"3. That this Court vacate all of its judgments heretofore entered in Appeal No. 16,780;

"4. That this Court order the [Trial Court], to set aside and vacate the judgment in Civil Action No. 2363;

"5. That this Court order the [Trial Court], to hold a new trial in Civil Action No. 2363;

"6. That this Court find, determine and assess both compensatory and punitive damages in favor of the petitioner against the respondent;

"7. That this Court award to petitioner against respondent reasonable attorneys' fees, together with costs and expenses, incurred by petitioner in the trial of Civil Action No. 2363 and all proceedings thereafter brought as a [17] result of the entry of judgment in said Civil Action;

"8. That this Court hold a full hearing 'En Banc' at Houston, Texas, for the convenience of the Court, Petitioner, Respondent and any witnesses and matters it might wish to hear;

"9. That this Court take such additional action as may be appropriate."

DYER, Circuit Judge, with whom Judge Wisdom joins, dissenting:

Counsel for both the petitioner and the respondent unequivocally stated on oral argument of this case that they both desired to stand upon the record before us and that neither party had any further proof to offer. On this state of the record petitioner has utterly failed to prove that the Trial Judge was disqualified, or to prove that the respondent was guilty of any fraud on this Court or on the District Court. The petition should be dismissed. I respectfully dissent.

APPENDIX B-2

[1403] JUDGMENT TO BE ENTERED

I would enter judgment as follows:

(a) Denying plaintiff the relief sought and dismissing the action at plaintiff's costs;

(b) Taxing all costs, including attorneys' fees, expert witness fees and related matters having to do with the question of Exhibit D-31, against the plaintiff, ror the reason that this charge was asserted fraudulently from its inception;

(c) Enjoining plaintiff, its officers, directors, attorneys, etc. from further raising the issues here presented in any further litigation in any court. These baseless charges of fraud, of bribery and corruption directed by the plaintiff not only against its adversary, but against every member of the Judiciary who in performance of his duty has held adversely to plaintiff, should not be permitted to continue. Plaintiff has had its full day in Court on all issues which it desired to raise.

Done at Houston, Texas, this 5th day of Sept. 1969.

BEN C. CONNALLY
United States District Judge

APPENDIX B-3

[1447] FINAL JUDGMENT

(Caption Omitted)

(Filed Nov. 12, 1969)

(Seal)

This cause having come on to be heard in accordance with the opinion dated October 15, 1968, of the Court of Appeals for the Fifth Circuit sitting en banc in Appeal No. 16,780, directing this Court to conduct hearings and to make findings and conclusions with respect to certain issues involved in the petition of Kinnear-Weed Corporation filed in the Court of Appeals on May 18, 1967, seeking relief from the prior final judgments in Civil Action No. 2363, Kinnear-Weed Corporation v. Humble Oil & Refining Co., in the U.S. District Court for the Eastern District of Texas, Beaumont, Division, and the ensuing appeal therefrom, said opinion also directing this Court to make "the initial determination" of what kind or character of relief, if any, should follow in consequence of this Court's findings and conclusions; and this Court having held such hearing and having heard the evidence adduced thereat, having considered the prior proceedings in this matter, having heard the arguments of counsel, and having made and entered its Findings of Fact and Conclusions of Law dated September 5, 1969, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

[1448] 1. Plaintiff's petition for relief from the prior judgments in Civil Action 2363 and Appeal No. 16,780

aforesaid should be and is hereby denied, plaintiff's said petition and any and all causes of action therein should be and are hereby dismissed, and all costs thereof should be and are hereby taxed against plaintiff.

2. Defendant is entitled to have and recover of plaintiff all of the defendant's costs and expenses, including attorney's fees, expert witness fees and related matters having to do with the question of Exhibit D-31, the amount of such costs and expenses to be determined at a hearing or hearings which will be held at a later date, if and when this portion of this judgment is affirmed.

3. Plaintiff, and plaintiff's officers, directors, attorneys and stockholders (including specifically but without limitation Wm. F. Weed, C.W. Kinnear and W.E. Kinnear), both individually and in their capacities as such officers, directors, attorneys and stockholders, and all other persons in active concert or participation with them, be and they are hereby enjoined from raising and/or litigating any of the issues presented in this proceeding in any further litigation in any court, including but without limitation the actions presently pending in this Court styled Kinnear-Weed Corporation v. Humble Oil & Refifining Company, C.A. 64-H-354, and Kinnear-Weed Corporation v. Humble Oil & Refining Company, C.A. 63-H-509. These issues are the alleged disqualification of Judge Lamar Cecil to try and decide C.A. 2363, the alleged fraud of Humble in failing to disclose and/or concealing such alleged disqualification from plaintiff and/or the courts, the alleged (or insinuated) corruption of Judge Cecil and other members of the judiciary [1449] by Humble, and the alleged fraud of Humble and/or

Hughes Tool Company respecting Exhibit D-31 in C.A. 2363.

Done at Houston, Texas, this 12th day of Nov., 1969.

BEN C. CONNALLY
United States District Judge

Approved as to form:

(Seal)

By: _____

Attorney for
Kinnear-Weed Corporation

APPENDIX B-4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29103

KINNEAR-WEED CORPORATION,
Plaintiff-Appellant,

versus

HUMBLE OIL & REFINING COMPANY,
a Texas corporation (now dissolved and merged into Standard Oil Company, a New Jersey corporation) its successor and/or surviving corporations and its assigns,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(April 26, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

CLARK, Circuit Judge: It is impossible to conceive of an issue judges would scrutinize more carefully than one which charges that a brother's breach of judicial ethics has produced a miscarriage of justice. Such an issue puts at stake more than the rights of the immediate litigants;

it challenges the even, fair administration of law. Therefore our most attentive examination is commanded. This sensitivity is heightened in the case at bar because he who allegedly prostituted the office we ourselves are sworn to uphold, died long before the subject of his official misbehavior was ever broached. Only the combination of the nature of the issue itself and a defense so handicapped can explain why, when we look long and carefully again—this time aided by the hitherto unavailable light of our present hindsight—we see that plaintiff has traversed the whole weary journey through court after court after court solely upon insinuations, inuendoes, inferences and assumptions of wrongdoing, every one of which are wholly without substance in fact. Given this insight to the proof—or more aptly, the lack of it—we reject plaintiff's suggestions that we now create novel duties of disclosure and standards of ethical conduct to be applied *ex post facto* to overcome (and really reverse) the well established presumption that official duties were correctly discharged. Thus, we agree that the court below correctly declined to give this plaintiff yet another go at trying to prove what so clearly does not exist. The judgment, injunction and assessment of costs entered by the district court must be affirmed.

In the beginning—April 6, 1953—Kinnear-Weed Corporation (Kinnear-Weed) filed a patent infringement suit against Humble Oil & Refining Co. (Humble). Since the opinion of the district court accurately and amply recites the history of this litigation from that point forward, the reader who wishes to retrace the route step by step is referred to ____F.Supp.____. It is sufficient here to say that the charges of judicial disqualification, initially advanced on September 28, 1959 (one year, seven months and four-

teen days after the judge involved had died), eventually resulted in our en banc order to the district court to conduct a hearing on all of Kinnear-Weed's allegations of wrongdoing and fraud and to file appropriate findings of fact and conclusions of law, 403 F.2d 437 (5th Cir. 1968).

The present appeal is from the findings and conclusions which we directed be made. Kinnear-Weed presents the following contentions here:

(A) United States District Judge Lamar Cecil, who presided over the original patent suit trial, was disqualified to discharge the judicial function in that case under the provisions of 28 U.S.C.A. § 455 (1968):[1]

(i) Because of an *improper* relationship to and connection with the defendant, Humble;

(ii) Because of a *substantial* interest in the disposition of the case; and

(iii) Because of the cumulative effect of (i) and (ii).

(B) Judge Cecil did not properly exercise his discretion under § 455, *supra,* when he made the decision to continue to sit in the case.

(C) Judge Cecil had a duty to make a full disclosure to the parties of his interest in the outcome of the litigation and his connections with Humble.

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1. "§ 455. Interest of Justice or Judge.
"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

(D) Humble had a duty to disclose the peculiar knowledge it had of the relationships between itself and Judge Cecil that might be relevant to the formation of an opinion that the Judge was disqualified by law to sit, and its failure to discharge this duty constituted a fraud on this Court and the Supreme Court.

(E) The district court from which the present appeal was taken erred in issuing an injunction preventing plaintiff from further litigating in any court the issues presented to that court and in taxing costs, including attorneys' fees of Humble, against Kinnear-Weed.

We consider these issues one by one:

(A) Kinnear-Weed denominated six descriptive categories of questioned relationships and activity by Judge Cecil. The opinion of the district court correctly analyzed the welter of allegations, claims and proof developed in each of these categories. At the outset, we note that the court correctly determined, as a matter of law, that the prior en banc decision of this court settled the question that the one time ownership of 100 shares of stock of Humble by Judge Cecil's wife did not constitute a statutory disqualification. (See 403 F.2d at 440.) As a second preliminary matter, we take cognizance of the rule that each of the other detailed fiindings in the trial court opinion must be examined under the clearly erroneous standard of review established in our en banc order directing entry of final judgment.____F.Supp. at____.

We now conclude that each finding was fully supported by the record developed originally before this Court of Appeals as amplified by the wide discovery and evidence gathering procedures allowed by the court below. In fact, Kinnear-Weed now differs in only one insignificant aspect

with the lower court's specific fact determinations.[2] Its disagreement comes with the conclusions of fact and the inferences drawn by the district judge from what are, for the most part, undisputed basic facts.

Our attention is, however, directed to the fact that the lower court made no findings relative to Judge Cecil's ownership during his tenure in office of stock in seven companies engaged in or related to the petroleum industry, and to stock ownership in another oil company which was sold early in his judicial career and prior to the entry of judgment in the subject action. In judging the significance of this oversight we are compelled to note the glaring inconsistency in Kinnear-Weed's conclusion that a statutory violation was shown by virtue of this ownership. The very reason why these holdings are alleged to constitute a disqualifying interest is the action of Judge Cecil in determining that the validity of Kinnear-Weed's claims affected and concerned the entire oil industry. Why would a man who was determined not to hold the balance true, by his own decision, supply the connecting link that would show disqualification? Why would he make such a sweeping finding favorable to contentions Kinnear-Weed might raise against companies in which he held a stock interest? To ask these questions is to answer them. These ownerships did not influence the judicial function. We have no difficulty in determining that the failure of the district court to expressly deal with this stock interest issue would not have affected the determinations made and is not reversable error.

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2. That difference related to whether Humble received annual notifications of Judge Cecil's connection as an officer and director of a corporation which did a *declining* volume and percentage of business with Humble during some of the years involved.

We have again reviewed the separate issues and the separate findings and conclusions of fact on each separate issue and found them to be supported by the record and free of clear error individually. We have also considered the totality of such circumstances collectively and agree with the district court that in their entirety they present no more than the speculative musings of a losing litigant.

The outcome of our review is predictable and, indeed, compelled on the basis of such findings and the conclusions drawn therefrom. Whether viewed bifocally for separate determinations as to (i) the propriety of Judge Cecil's relationship to or connection with Humble as an entity, and (ii) his possession of a substantial interest in the disposition of the case; or altogether to test (iii) the cumulative impact of the judge's relationship to, connection with and interest in the party and the subject matter, the district court was clearly erroneous in determining that no one or combination of these contentions was well taken.[3]

(B) The district court's factual conclusion that Judge Cecil considered the matter of his possible disqualification and properly concluded that it was his duty and his obligation to continue to preside in this case, is correct. Kinnear-Weed had the burden of producing clear and convincing evidence that a public officer such as Judge Cecil, failed to discharge the duty mandated by § 455. *Chaney v.*

3. Although the district court stated it did not understand plaintiff to contend that Judge Cecil had a substantial interest in this case, the court did conclude that he obviously did not. It is unnecessary to consider whether that issue was properly presented to the trial court so as to make it subject to review, because the same detailed findings of fact would control. The relationship to and connection with Humble is really the interest claimed to be disqualifying.

United States, 406 F.2d 809 (5th Cir. 1969). Speculation and suspicion are just not any evidence at all that Judge Cecil, as a matter of fact or as a matter of law, violated his duty *Charlson Realty Co. v. United States,* 384 F.2d 434, 181 Ct.Cl. 262 (1967). Kinnear-Weed has wholly failed to demonstrate that Judge Cecil's discretion was abused.

(C) Section 455 vests in the justice or judge the obligation to determine that a substantial interest or relationship to or connection with a party rendered it improper to sit in the seat of judgment. The mere restatement of the statute's rule really answers the contention advanced by Kinnear-Weed that Judge Cecil had a duty, even in the absence of any issue raised about it, to make affirmative disclosures so that the matter of his disqualification could be considered by the litigants. Congress made it expressly plain that it placed *in the justice or judge* the responsibility for making the determination *"in his opinion"* that he should disqualify himself. Thus, we reject the contention of Kinnear-Weed that the rationale of *Commonwealth Coatings Corp. v. Continental Casualty* Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968) should be applied here. That case held that an arbitration decision should be set aside where the supposedly independent arbitrator is later shown to have had "the slightest pecuniary interest" in one of the parties whose dispute was submitted for arbitration. We are urged to reason from that case that judges whose contact with decision-making is continuous, not episodic, are not only to be governed by the same immaculate and sterile criterion as those who may be chosen as an arbitrator, but also that judges should submit the facts to litigants before them to avoid the necessity for those parties to conduct secret investiga-

tions into the private affairs of judges. Such rules would neither serve the healthy and necessary concept that justice must satisfy the appearance of justice, nor the policy enunciated by Congress in § 455. We therefore have no hesitancy in refusing to apply them retroactively to Judge Cecil's conduct. Judges must function daily and continuously over a broad spectrum of causes with varied parties and interests. They are almost bound to be called upon to pass judgments in matters where they have some shade of indirect economic interest. If "slightest" is to be substituted for "substantial", it should be by congressional, not judicial, decision; for it will surely have a substantial effect on the ability of federal courts to function with the present numbers of judges. Kinnear-Weed's frank concession that it could find no cases directly in point opting for the duty of disclosure to litigants, which it urges, is significant. Those cases which have discussed the responsibility placed by Congress under § 455 have clearly held it is upon the judge. *See Weiss v. Hunna,* 312 F.2d 711 (2d Cir. 1963); *MacNeil Bros. v. Cohen,* 264 F.2d 186 (1st Cir. 1959); *Darlington v. Studebaker-Packard Corp.,* 261 F.2d 903 (7th Cir. 1959); *Voltman v. United Fruit Co.,* 147 F.2d 514 (2d Cir. 1945); *Utz & Dunn Co. v. Regulator Co.,* 213 Fed. 315 (8th Cir. 1914).

This is not to say that the standard is or ought to be immutable. Under the mores of a different day Congress may see fit to change it. Certainly it is plain that the present ultimate test the statute lays down has implicit in it a large measure of public confidence in the personal integrity of the humans appointed to fill the positions of judicial trust under the system for the administration of justice in the federal courts. Leaving legislation to that

branch, we hold that what may have been requisite for consideration or determinative on the issue of disqualification was, in 1953 through 1957—the years actually involved, committed to Judge Cecil's sound discretion.[4]

(D) The next issue raised is that Humble committed a fraud on the courts in its failure to make a complete enough disclosure of its relationships with Judge Cecil and his family. In this connection it should be borne in mind that at the time Kinnear-Weed's attack was initiated it was not directed at Judge Cecil alone but also included Judges Hutcheson, Rives, Jones and Wisdom of this court,

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4. It is appropriate to observe that the decision in this case is of limited precedential value. Today, in addition to the statute, certain requirements promulgated by the Judicial Conference of the United States and advisory opinions issued by the Interim Advisory Committee on Judicial Activities guide federal judges in the exercise of their discretion. In September 1963, the Judicial Conference adopted a resolution forbidding justices and judges from serving as officers or directors of corporations organized for profit. Since January 1, 1970, the Judicial Conference has had in force a requirement that all federal judges, except the justices of the Supreme Court, file public reports every six months detailing all extra-judicial income, gifts and positions held in any organization during the preceding six months. In addition, the report must list all cases in which the judge has participated in the preceding six months in which he had any interest, and the nature and amount of such interest, and the reason the judge felt his participation was proper. In addition to these mandates, the Advisory Committee has suggested in Advisory Opinion No. 20 the following procedure when a judge or a member of his immediate family owns stock in a corporation which is a real party in interest in the litigation. The judge should advise all counsel, at the earliest practicable time, of his interest in the corporation and ask the lawyers to reply in writing to the Clerk of the Court whether they wish the judge to hear the case. "Unless the attorneys for all parties request the judge to continue, the Clerk should not tell the judge which lawyers did not make such request, and the judge should not act thereafter in the case." Despite the practical limits on what we say as precedential value for the future, Judge Cecil's actions in the 1950's are not to be judged by the judicially imposed and recommended standards of today.

and was couched in terms charging that all such judges had practiced "lowdown common thievery" and had been guilty of "misconduct, dishonest and fraudulent acts and omissions [which] are disgraceful and illegal". Rather than faulting Humble's disclosures, we are strained to conceive of any duty on the part of an adverse litigant to inject himself into such a specific controversy between court officials and his opponent. No rational litigant would allege criminality and fraud if his basis in fact for such charges was so weak that he needed documentation from his opponent. In the dispassionate and calm reflection of this later day, we have more difficulty in understanding how these public charges failed to result in proceedings for contempt than we do in comprehending some duty on Humble's part to furnish information. Since we have made it abundantly clear that the responsibility was placed by Congress upon each individual judge to determine his own disqualification, we deny that these allegations created any duty on the part of Humble to respond. Especially when, years later, all that the intensive additional investigation conducted by Kinnear-Weed has produced that was not voluntarily disclosed by Humble in the way of connections with or relations to Judge Cecil, are trivial or insignificant matters that merely furnish springboards for speculation, rather than evidence of substantial or sinister ties. In testing the sufficiency of proof in federal courts, federal not state standards must be applied. *Cf. Boeing v. Shipman,* 411 F.2d 365 (5th Cir. en banc, 1969). We hold that fraud proof must be built of sterner stuff. Clear and convincing evidence was what was required. *Merrill-Stevens Dry Dock Company v. M/V "Laissez Faire",* 421 F.2d 430 (5th Cir. 1970); *see also Pacific Royalty Company v. Williams,* 227 F.2d

49 (10th Cir. 1955); 37 Am. Jur. 2d, Fraud and Deceit § 468; 37 C.J.S., Fraud § 114.

(E) Kinnear-Weed's final point relates to determinations of the present district judge rather than to the vitality of Judge Cecil's adjudications. It argues that the district court erred in awarding costs, including attorneys' fees and expert witness fees to Humble. The district court had awarded these costs because the charge made by Kinnear-Weed out of which these costs arose was found by the district court to have been asserted fraudulently.[5] We note that we are dealing with an exercise of discretion by the district court, and will not overturn his decision unless a clear abuse thereof is shown. The general rule is that the district court can award such fees and costs when an unfounded action or defense is maintained in bad faith, vexatiously, wantonly, or for oppressive reasons. 6 J. Moore, Federal Practice § 54.77 (2), at 1352 (2d ed. 1966). If there ever was a case that fits this general rule, this is it.

The district court also enjoined Kinnear-Weed from litigating again in any court the issues that it had decided here. Under the All Writs Statute, 28 U.S.C.A. § 1651,[6] a federal court has the power to enjoin a party before it from attempting to relitigate the same issues in another federal court. *Toledo Scale Co. v. Computing Scale Co.*,

5. This concerned a charge that Humble and a third party, not involved in this litigation, had altered and modified a physical exhibit. After extensive opportunity for proof development, plaintiff's counsel conceded it had no basis for its accusations and requested the entire issue be withdrawn from consideration. The court refused this request.

6. "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their jurisdictions and agreeable to the usages and principles of law." 28 U.S.C.A. 1651(a) (1966).

261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719 (1923); *Aleograph Co. v. Electrical Research Products, Inc.*, 82 F.2d 625 (5th Cir. 1936). Certainly one factor that the district court could and did take into account in exercising its discretion to issue the injunction was the harassing and vexatious character of this litigation. We cannot say that the district court abused its discretion in this regard. Kinnear-Weed asserts that the injunction is too broad because it will be prevented from asserting new and additional factual matters not adjudicated in this proceeding. The injunction does no more than embody the principles of res judicata and collateral estoppel. Kinnear-Weed has had its day in court on the present issues — not once, but several times. We interpret this injunction to preclude Kinnear-Weed from raising any of the issues presented in its original patent infringement suit and any issues related to the questioned Exhibit D-31 against Humble or any other litigant, and from further asserting any alleged judicial indiscretion on the part of Judge Cecil, and in this action we can find no abuse of discretion. Having sown the wind, it must inexorably reap the whirlwind.

Costs of this appeal, including reasonable attorneys' fees incurred by Humble on this appeal, are assessed against Kinnear-Weed. 28 U.S.C.A. § 1912 (1966); F.R.A.P. 38; 6 J. Moore, *supra* at 1353.

The judgment of the district court is in all respects affirmed and the cause is remanded to the district court with directions to fix the amounts of the fees allowed hereunder at the time such costs and expenses allowed by the district court's final judgments are determined.

AFFIRMED AND REMANDED

APPENDIX B-5

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

NO. 29103

D.C. Docket NO. Misc. 68-H-40

KINNEAR-WEED CORPORATION
Plaintiff-Appellant

v.

HUMBLE OIL & REFINING COMPANY, a Texas corporation (now dissolved and merged into Standard Oil Company, a New Jersey corporation) its successor and/or surviving corporations and its assigns,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before THORNBERRY, MORGAN and CLARK, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal, including reasonable attorneys' fees, to be taxed by the Clerk of this Court.

April 26,1971

Issued as Mandate: July 7, 1971

APPENDIX B-6

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29103

KINNEAR-WEED CORPORATION,
Plaintiff-Appellant,

versus

HUMBLE OIL & REFINING COMPANY, a Texas corporation (now dissolved and merged into Standard Oil Company, a New Jersey corporation) its successor and/or surviving corporations and its assigns,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(June 17, 1971)

ON PETITION FOR REHEARING

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX B-7

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 29,103

(Filed July 2, 1971)
KINNEAR-WEED CORPORATION,
Petitioner-Appellant,

v.

HUMBLE OIL AND REFINING COMPANY, a Texas Corporation (now dissolved and merged into Standard Oil Company, a New Jersey Corporation) its successor and/or surviving corporation and its assigns,
Respondent-Appellee.

MOTION FOR LEAVE of Court to Order Filing of Appellant's June 27, 1971 Papers entitled REPLY TO LETTER RESPONSE Dated June 24, 1971 OF APPELLEE AS TO ABANDONMENT OF D-31, and, MOTION AND SUPPLEMENTAL PETITION FOR REHEARING dated June 15, 1971.

To The United States Court of Appeals For The Fifth Circuit and To The Honorable Judges Thereof:

Petitioner-Appellant requests the Court to Order the filing of Appellant's June 27, 1971 paper entitled REPLY TO LETTER RESPONSE Dated June 24, 1971 OF APPELLEE AS TO ABANDONMENT OF D-31 (Pltfs. Ex. No. 110 this record), and, requests the Court

to Order the filing of Appellant's paper entitled MOTION AND SUPPLEMENTAL PETITION FOR REHEARING presented June 16, 1971 and here re-submitted. Further requests the Court consider and rule upon PETITION FOR REHEARING on file herein in connection therewith.

The Court is respectfully requested to rule upon the *NEWLY DISCOVERED EVIDENCE* which was only discovered by Appellant's Counsel on June 13, 1971 as per affidavit of Eddie R. Kehrer and Exhibits referred to by him in said SUPPLEMENTAL PETITION FOR REHEARING which conclusively proves a prima facie case that Exhibit D-31 introduced by Appellee in C. A. No. 2363 is a FRAUDULENT BIT. Also that Appellee falsely *DEFENDED* D-31 in the court below as an authentic and genuine bit *"made in the 1910-1912 era by Sharp-Hughes Tool Co."*.

Appellee stated in its letter response dated June 24, 1971, that:

> "Since Appellant, during the District Court proceedings, expressly abandoned its claim that D-31 was a fraudulent exhibit, there would seem to be no reason whatever for this Court or the Supreme Court to concern themselves with further testing or examination of the bit."

Appellant received the June 24, 1971 letter response of Appellee on June 25, 1971. Ruling of the Court denying filing of SUPPLEMENTAL PETITION FOR REHEARING dated June 15, 1971 received by Appellant on June 28, 1971. This gave advantage to Appellee which was unfair to Appellant to respond thereto. Ap-

pellant had no way to know that Appellee was urging a false charge that Appellant had "expressly abandoned" its claim that D-31 was a fraudulent exhibit. There was no way whatsoever to reply thereto before the court ruled on June 25, 1971 which ruling was received by Appellant on June 28, 1971 (Monday). The abandonment question was raised by Appellee's letter response of June 24, 1971 and was received by the Court the same day the court ruled on June 25, 1971. Appellee knew its claim of abandonment was false and malicious. This argument was made by Appellee for the purpose of misleading the Court. Appellee's false argument is disproved by Appellant's paper entitled "REPLY TO LETTER RESPONSE Dated June 24, 1971 OF APPELLEE AS TO ABANDONMENT OF D-31". The exact exchange of what Appellant and Appellee said and the Court's statement and ruling to Counsel for both sides is quoted therein. Judge Connally ruled that he would hear any proof that D-31 was changed at some time, (Tr. of Record, Page 747-48):

"MR. STICKLE: Your honor, before we proceed, could we go back just a moment so we can determine how your honor is going to receive the statement that was handed up this morning concerning our waiver.

THE COURT: I don't know if I am in position to say what findings I am going to make on this thing, Mr. Stickle.—Cont'd Page 748

And if you want to put on proof that D-31 was changed at some time but not in connection with this thing. I will hear it. I am not in position to

> tell you categorigally what view I will take on it when getting around to it.
>
> So, if there is any doubt about it and you think in abundance of caution you wish to put it on, you had better do so."

Thereafter, both parties introduced deposition testimony on the subject of D-31. Appellant contending that D-31 was a fraudulent bit while Appellee defended D-31 was an authentic and genuine bit made in the 1910-1912 era. Appellant introduced deposition testimony of Appellee's expert witness Wiley Noble Ex. No. 143 from which appellant quotes profusely in proving up that D-31 is a phoney and fraudulent bit. Also the deposition testimony of E. L. Von Rosenberg Ex. 144. Thereafter Mr. Tucker, Counsel for Appellee introduced deposition testimony bearing on D-31 of Floyd L. Scott Ex. Nos. 2A and 2B, Lyle L. Payne Ex. Nos. 3, 4 and 5 and of C. W. Kinnear Ex. Nos. 6 and 12.

Appellant has been denied its paper entitled REPLY TO LETTER RESPONSE Dated June 24, 1971 OF APPELLEE AS TO ABANDONMENT OF D-31 which Appellant here requests to be filed, and, re-submittal of paper entitled MOTION AND SUPPLEMENTAL PETITION FOR REHEARING dated June 15, 1971 presented June 16, 1971. The Court surely wants the truth about the vital issue on D-31 and should Order these Two (2) papers of Appellant filed and Order Oral Arguments thereon which Appellant here earnestly requests of the Court.

The importance of the newly discovered evidence found out on July 13, 1971 and set forth in the Affidavit of

Eddie R. Kehrer was *"God-sent"* and shows that D-31 is a fraudulent exhibit all the way through the entire proceedings in all Federal Courts. This Court must listen to Appellants plea as a sincere effort to present the truth about D-31. The sincerity and forthright manner in respectfully presenting this vital piece of evidence to the Court must bring a response from the Court to entertain such evidence as the truth, or, Appellee will again defeat justice by its falsehoods about D-31 as being an authentic and genuine bit. Please will this Court accept the positive side in arguments by Appellant and not the negative side of the argument throughout by Appellee.

Will the Court respectfully read the Affidavit of Eddie R. Kehrer, a former employee of Sharp-Hughes Tool Co., and its successor in business Hughes Tool Co., from the years of June 1910-1918 and 1909 to June 1910 for Houston Car Wheel Co., who machined the 3 and 2 cone bits of the Hughes organization. Mr. Kehrer has gained great distinction in the machine practice art retiring as head of Machine Operations for plant of Mobil Oil Co., at Beaumont, Texas. He has truthfully given the court the real evidence to enable the Court to see that D-31 is a fraudulent bit.

Please will the Court read the June 15, 1971 Motion and SUPPLEMENTAL PETITION FOR REHEARING presented in person by Counsel for Appellant on June 16, 1971. When the Court will have read or re-read the Affidavit of Eddie R. Kehrer it must move the Court to give justice these pleadings cry-out for in this case as to D-31 being a fraudulent bit. Eddie R. Kehrer is the one who made the first 3 cone bit for Sharp-Hughes Tool Co., at the Houston Car Wheel Co., shop in Houston, Texas from

Brown & Sharpe Mfg. Co., drawings and specifications as shown in Exhibit A-2 in said Appellant's Two (2) papers above-mentioned. He made this first 3 cone bit in the year 1909. He also knows the complete history of Hughes making 3 and 2 cone bits from 1909 thru 1918. He is an unbiased witness and is in position to truthfully give such exact information about how Hughes made his 3 cone bit and 2 cone bits. Kehrer says in his affidavit that the water discharged through the drilled water courses of all Hughes 3 cone and 2 cone bits from 1909-1918 hit on the cones. This was a Hughes design up until the year 1948 when Humble drilled with Hughes Tool Co. first "jet rock bit" having cones thereon and the water or mud discharged through the water courses of said bit missed the cones and hit on the outer bottom portion of the well hole. Mr. Kehrer states that Sharp-Hughes Tool Co., and its successor Hughes Tool Co. did not make any 3 or 2 cone bits in the era from 1909-1918 where water discharged thru water courses of said 3 and 2 cone bits to miss the cones and hit on the outer bottom portion of the well hole. This idea of the water discharging from the water courses and missing the cones and hitting on the outer bottom portion of the well hole is the grant by the U. S. Patent Office to C. W. Kinnear of his U. S. Patent No. 2.380.112 and the Re-issue patent thereof Re. 23,416, and. is the first so called "jet bit" employing this principle. Unless the Court looks at the facts set forth in the Kehrer Affidavit and the papers filed or presented for filing by Appellant the Court will not come to the correct decision on this issue of D-31 as it is being pawned off to the court as an authentic and genuine bit, whereas, the facts are that D-31 is a fraudulent exhibit. Appellant can do no more than present true evidence against the false evidence of Appellee.

Please grant the Appellant justice on this matter which it has fought for 18 long years. Can anyone say that Appellant is not sincere about its claim that D-31 is a fraudulent bit when you consider that Appellant has fought for its rights for 18 long years from the date of filing this suit on April 6, 1953.

WHEREFORE, Appellant prays the Court to Grant:

1. Order the filing of Appellant's June 15, 1971 MOTION AND SUPPLEMENTAL PETITION FOR REHEARING hereby re-submitted;
2. Order the filing of Appellants REPLY TO LETTER RESPONSE Dated June 24, 1971 OF APPELLEE AS TO ABANDONMENT OF D-31;
3. Order Metallurgal and Chemical Testing of the metal parts of D-31;
4. Grant all of the relief prayed for in the Petition For Rehearing;
5. Grant all of the relief prayed for in the Original Petition of Petitioner, Appellant's Brief and Reply Brief on Appeal; and,
6. For such other and further relief to which Appellant is entitled in law and in equity,

Respectfully submitted,

FRED PARKS

W. FRANK STICKLE, JR.
Hanson, O'Brien, Birney & Stickle

WILLIAM E. KINNEAR

By WILLIAM E. KINNEAR
William E. Kinnear

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing MOTION, etc., is made in good faith and not for the purpose of delay and that it is well founded in law and in fact.

WILLIAM E. KINNEAR
William E. Kinnear

Attorney For Appellant,
Kinnear-Weed Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 1971 the above and foregoing MOTION, etc., was served on said date upon Mr. Garrett R. Tucker, Jr., One Shell Plaza, Houston, Texas 77002, and upon C. O. Ryan, 2306 Gulf Building, Houston, Texas 77002, Attorneys for Appellees Humble Oil and Refining Company and Standard Oil Company (Incorporated in New Jersey) by depositing copies thereof in the U. S. Mails, postage prepaid, at Beaumont, Texas on July 1, 1971.

WILLIAM E. KINNEAR
William E. Kinnear

Attorney For Appellant,
Kinnear-Weed Corporation

AFFIDAVIT OF EDDIE R. KEHRER

THE STATE OF TEXAS ( )

COUNTY OF JEFFERSON ( )

KNOW ALL MEN BY THESE PRESENTS:

Eddie R. Kehrer, a resident of Beaumont, Jefferson County, Texas and being a credible person, first after being duly sworn upon oath deposes and says:

That I was employed by the Houston Car Wheel Company operating lathes, and other machine tools in the plant of said company during the year 1909, whose plant at which I worked was located in Houston, Harris County, Texas. That during said year Mr. Howard R. Hughes, Sr., of Sharp-Hughes Tool Co. handled all of the manufacturing as well as other duties for Sharp-Hughes Tool Co., and he lived in Houston, Texas. That Sharp-Hughes Tool Co., through Mr. Howard R. Hughes, Sr., engaged Houston Car Wheel Co. with whom I was employed to make a 4″ 3 Cone Bit and furnished Drawings and Specifications prepared by Brown & Sharpe Mfg. Co., of Providence, R. I. with which to make said bit. That it was the first cone bits which was made by Houston Car Wheel Co. for Sharp-Hughes Tool Co., and as stated it was for 3 Cone Bit to be made in accordance with the Drawings and Specifications of Brown & Sharpe Mfg. Co. and it was to be made of Jessop Steel in so far as the steel parts of the bit were concerned. The cone bushings that fit on the spindles or bearing pins assembled with the 3 cones and mounted on the spindles and bearing pins of the 3 body segments that forms the head of the bit and the retainer rings were made by me in the machine shops of Houston Car Wheel Co. during the year 1909 and the

bit was delivered to Sharp-Hughes Tool Co. upon competion thereof as a complete bit.

That I have viewed recently on Sunday, June 13, 1971 the attached Exhibit (App. A-2) which is the drawings and specifications for the making of 4" - 3 Cone bit of Brown & Sharpe Mfg. Co., of Providence, R. I., made as shown thereon and completed on Jan. 6, 1909. The water courses 17 (3 in number) one each were drilled through each of the 3 body segments which forms the head when mated together and collar screwed over the top threaded parts of the body segments would hold the bit together, of course, first having mounted the cone, bronze bearing and retaining ring assembly on the spindles or bearing pins of the each of the 3 body segments. I drilled a water course through each body segment and each water course was drilled from shoulder below threaded upper end of each body segment on a course downwardly and slanted inwardly so that the terminating ends of the water courses would deliver water or mud to the top of the cone it was to service in cleaning mud impacted between the teeth of the cones, as well as, to cool the cone heated from friction of turning and drilling in the earth formations in the hydraulic rotary system of drilling.

I got to know Mr. Howard R. Hughes, Sr., very well having made several cones bits for his company and at his instance and direction from said Brown & Sharpe Mfg. Co. drawings and specifications. Jessop Steel was used in making the body segments to form the head of the bits, the cones, retainer rings of the 3 cone bits I made while working for Houston Car Wheel Co., and later in June during the year 1910 I was employed by Sharp-Hughes

Tool Co. to make cone bits of the 3 cone and 2 cone type. Sharp-Hughes Tool Co. rented a small space thereafter from Houston Car Wheel Co., in its plant in Houston, Texas to carry on their operations. Thereafter, Sharp-Hughes Tool Co., moved into its first shop near the MK&T Depot in Houston, Texas in an old building on the premises formerly occupied by Armour Packing Co., and made 3 and 2 cone bits up to around the year 1915-16 and I worked in said shop operating machines to make said 3 and 2 cone bits, in the old Armour Packing Co. building during all of which time said 3 and 2 cone bits were made providing drilled water courses through the heads of the bits to deliver the mud or water pumped through them to hit on the top of the cones. Then, in the 1915-16 era the new plant on Baker Street about 2 blocks off Harrisburg Boulevard in Houston, Texas was moved into and I had charge of setting up a machine at a time as they were moved from the plant by MK&T depot location to the Baker Street location. I was in charge of the Tools and Dies and experimental machine shop for making new designed cone bits and all through the changes and different small changes in the designs of the bits Hughes Tool Company and its predecessor Sharp-Hughes Tool Co., had the same basic design and arrangement of the water courses to deliver the water or mud to the top of the cones to clean the cones and to cool the cones. The 3 cone bit was replaced for the most popular sized cone bits during 1912 forward, except for a few larger sized bits to drill large surface holes were made up to around 1914, however, most of the bits were 2 cone bits beginning in 1910 on through 1918 when I terminated my employment with Hughes Tool Co. after the end of World War I, that is, after Armistice day, November 11, 1918.

All during the time that I was employed by Houston Car Wheel Co., and made the first 3 cone bit for Sharp-Hughes Tool Co. in 1909 until I left Hughes Tool Co. after World War I ended I was in and around the shops doing machine work on 3 and 2 cone bits and experimental bits and at no time did the water courses in cone bits of 3 or 2 cone design were made by Sharp-Hughes Tool Co. from 1909 up through 1915-16 era or thereafter when Hughes Tool Co. succeeded Sharp-Hughes Tool Co. until I terminated my employment with Hughes Tool Co. after end of World War I after November 11, 1918 did Hughes Tool Company provide water course in any of their 3 or 2 cone bits so that water or mud pumped through the water courses of the bits would miss the cones and hit on the outer bottom portion of the well hole in unbroken concentrated streams of fluid. That I retired from Mobil Oil Co., head of Machine Operations in Jan. 1, 1957.

If called as a witness in any court of competent jurisdiction the above will be my testimony.

/s/ EDDIE R. KEHRER
(Eddie R. Kehrer)

Sworn to and subscribed before me by the said Eddie R. Kehrer on this 15th day of June, 1971; to certify which witness my hand and seal of office on said date.

/s/ CHARLOTTE GRIFFIN
(Charlotte Griffin)

(SEAL)

Notary Public in and for
Jefferson County, Texas

DEFENDANT'S EXHIBIT
Floyd L. Scott
Volt No. 2B

H. R. HUGHES.
ROLLER DRILL.
APPLICATION FILED MAR. 27, 1909.

959,540. Patented May 31, 1910.

3 SHEETS—SHEET 1.

Fig. 1.

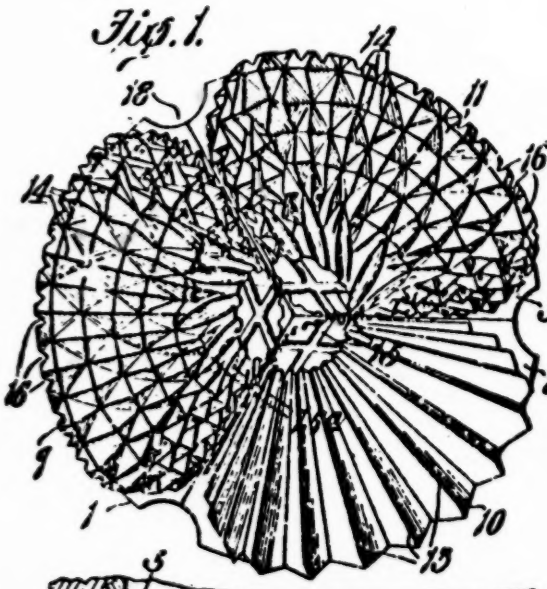
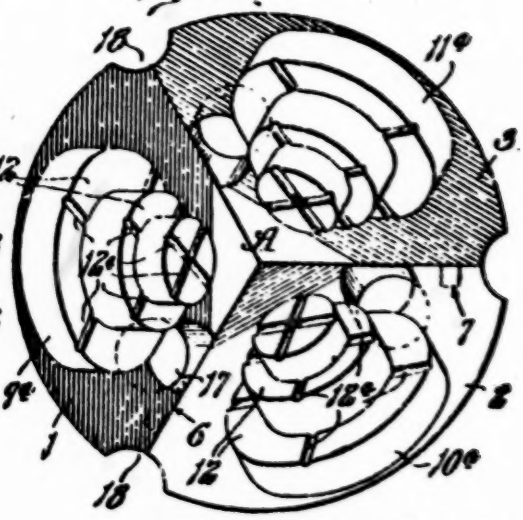


Fig. 3.



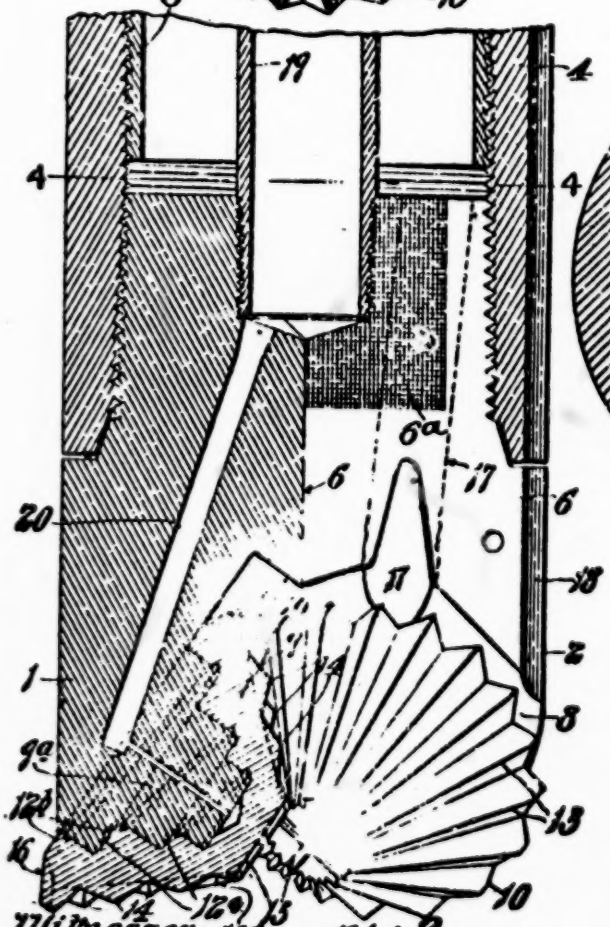


Fig. 2.

Fig. 4.

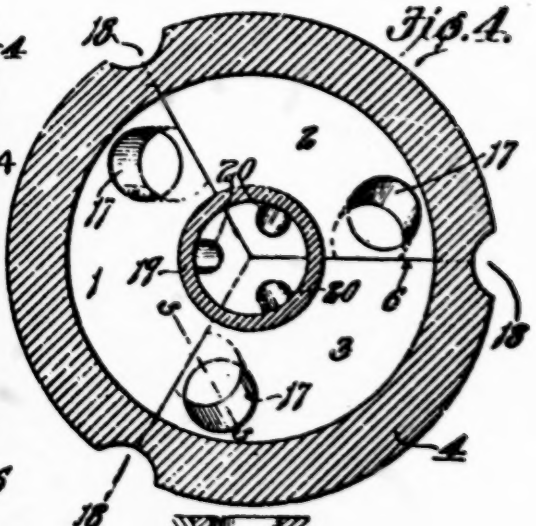


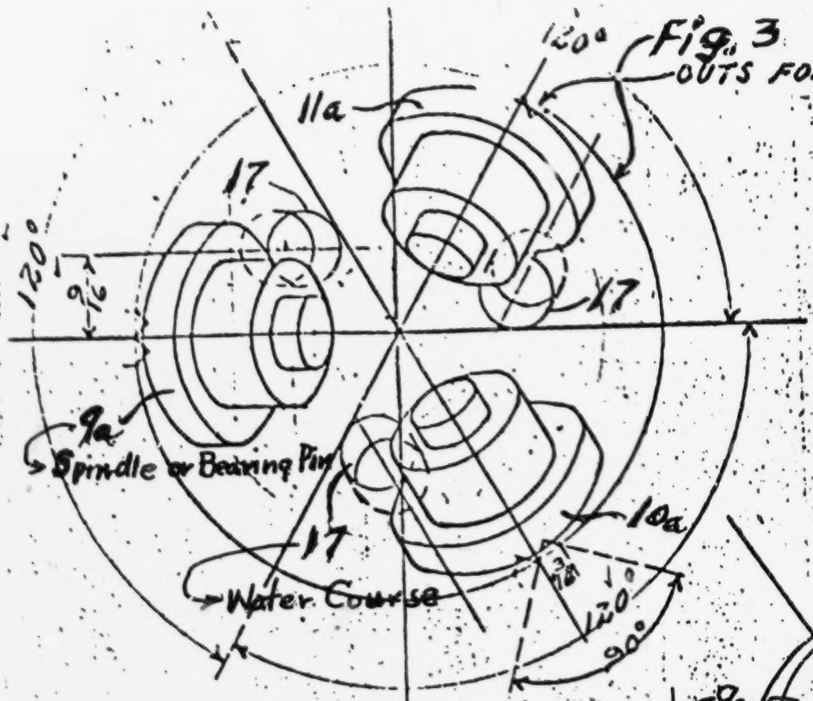
Fig. 5.

Witnesses:
George Ledoux
Wells L. Church

Inventor:
Howard R. Hughes.
by Rust Badgwell
Atty.

PLAINTIFF'S EXHIBIT
Wirz Suit
P. 108-126
P. 127-Lingo-162
NO. P-143

Fig. 3
CUTS FOR CHAIN TRENCH.



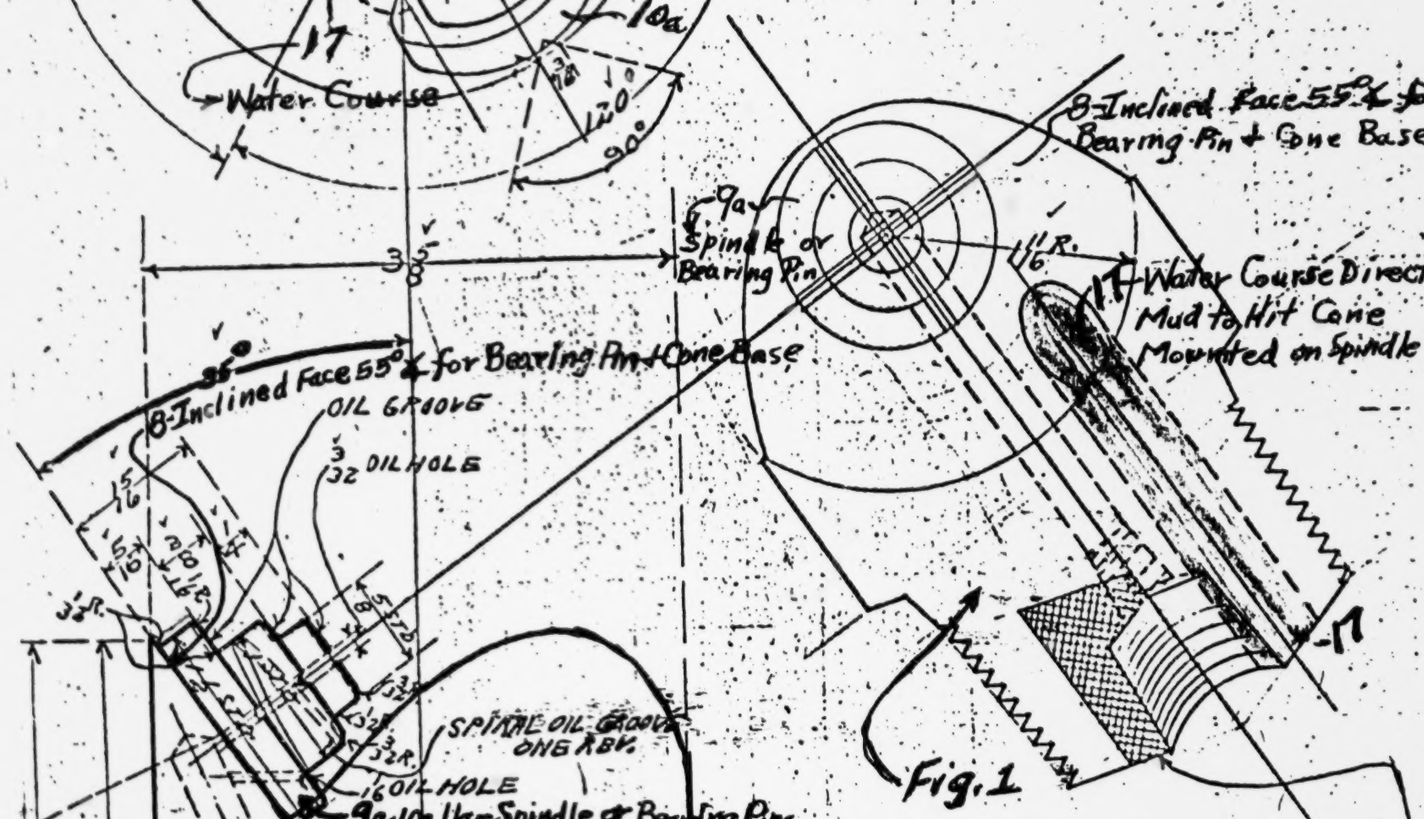


Fig. 1

CORRUGATE FOR PAPER PACKING ON ONE SIDE OF EACH SEGMENT SO THAT A ROUGH & SMOOTH SURFACE WILL COME TOGETHER.

4" DRILL HEAD
1- JESSOP STEEL

FURNISH.
3-1/8 PIPE PLUGS DRILL 2½ HOLES IN CENT

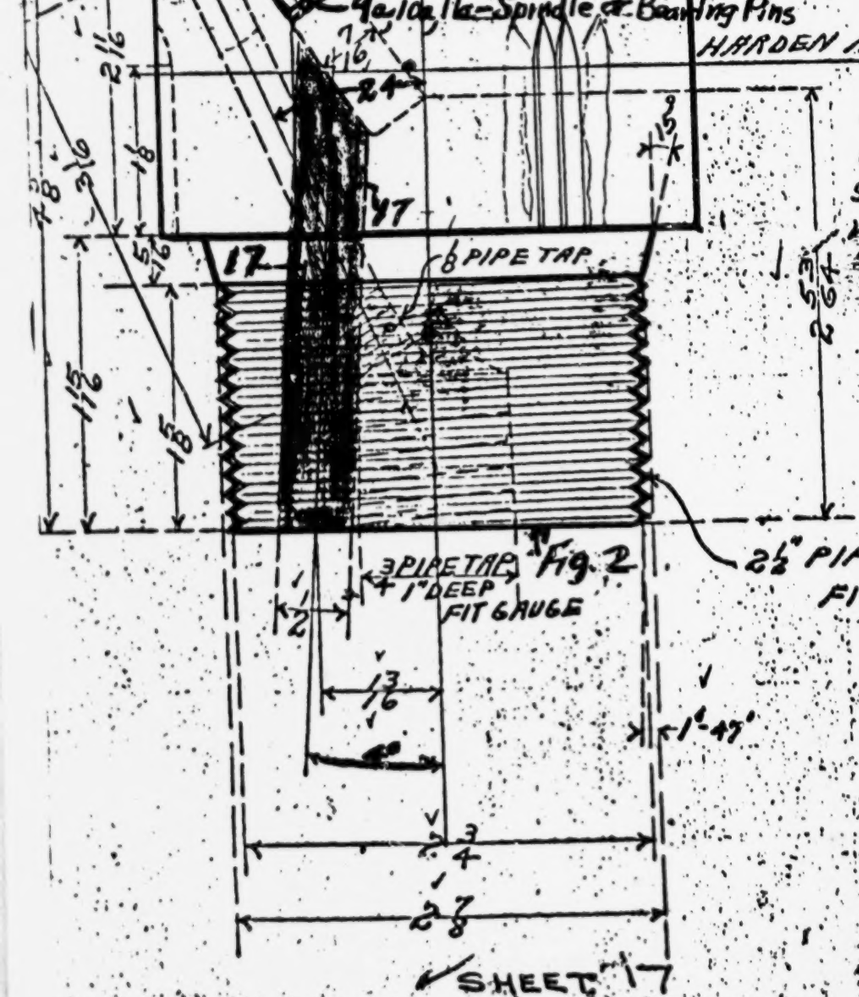


Fig. 2

TIME	6272	LOT	

4" DRILL HEAD (3 CUTTERS)
FOR
HOWARD R. HUGHES
HOUSTON, TEXAS.

DATE JAN. 6, 1909 J.F.S. EXD.
BROWN & SHARPE MFG. CO.
PROVIDENCE, R.I.

SHEET 17

A-2

APPENDIX C-1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,780

KINNEAR-WEED CORPORATION,
Petitioner-Appellant

v.

HUMBLE OIL & REFINING COMPANY,
a Texas Corporation
(now dissolved and merged into Standard Oil Company,
a New Jersey Corporation) its successor and/or
surviving corporations and its assigns
Respondent-Appellee

MOTION OF PETITIONER-APPELLANT
FOR LEAVE TO FILE:

1. PETITION OF PETITIONER-APPELLANT
2. PETITIONER-APPELLANT'S MOTION TO STAY PROCEEDINGS IN CIVIL ACTIONS NOS. 63-H-509 and 64-H-354 CONSOLIDATED, PENDING IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

The Petitioner-Appellant moves the Court for leave to file its PETITION and MOTION TO STAY PROCEED-

INGS etc. hereto annexed for the reasons stated therein, and further, moves that an order and rule be entered and issued directing the above named Respondent-Appellee to show cause why this PETITION should not be granted and an order issued against them in accordance with the requests and prayer of said PETITION, and why Petitioner-Appellant should not have such other and further relief in the premises as may be meet and just.

Respectfully submitted,

FRED PARKS
1599 Houston Club Building
Houston, Texas 77002

/s/ _____
FRED PARKS

WILLIAM E. KINNEAR
Beaumont Savings Building
Beaumont, Texas 77701

/s/ _____
WILLIAM E. KINNEAR
Attorney for Petitioner-Appellant

Of Counsel

Arthur B. Hanson
W. Frank Stickle, Jr.
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(Certificate of Service Omitted)

APPENDIX C-2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,780

KINNEAR-WEED CORPORATION,
Petitioner-Appellant

v.

HUMBLE OIL & REFINING COMPANY,
a Texas Corporation (now dissolved and merged into Standard Oil Company, a New Jersey Corporation) its successor and/or surviving corporations and its assigns,
Respondent-Appellee

PETITION OF PETITIONER-APPELLANT

To the United States Court of Appeals For the Fifth Circuit and Honorable Judges thereof:

Petitioner-Appellant moves this Court to grant this Petition in all respects and to grant:

Amendment and enlargement of "NOTIFICATION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE HONORABLE JUDGES THEREOF THAT THE JUDGMENT OF THIS CASE IS ILLEGAL AND THAT A CONTEST STILL REMAINS" filed by Appellant's assignee and

ordered filed herein on January 13, 1960, so that the same be considered a petition for hearing and determination by this Honorable Court of fraud practiced upon it in Appeal No. 16,780; to vacate its judgment in Appeal No. 16,780 and order the court below to set aside its judgment in Civil Action No. 2363; to order a new trial of the issues raised in Civil Action No. 2363; and to take such additional action as may be appropriate;

or in the alternative grant

Petition for hearing and determination by this honorable Court of fraud practiced upon it in Appeal No. 16,780; to vacate its judgment in Appeal No. 16,780 and order the court below to set aside its judgment in Civil Action No. 2363; to order a new trial of the issues raised in Civil Action No. 2363, and to take such additional action as may be appropriate;

or in the further alternative

By this Court's own order investigate, hear and determine all aspects of fraud and/or conspiracy practiced upon it by Respondent-Appellee as set out herein and all other fraud and/or conspiracy it might uncover through a full investigation and hearing.

[1] I

Jurisdictional Statement

This Court has ample authority to entertain this petition and to hear and determine the question of fraud perpetrated upon it and the United States District Court for the Eastern Division of Texas in Appeal No. 16,780 and in Civil Action No. 2363 in the United States District Court for the Eastern District of Texas.

The saving clause of Rule 60(b) of the Federal Rules of Civil Procedure makes it clear that nothing in that Rule limits the inherent equitable power of a court to either entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. The pertinent provision of Rule 60(b) is as follows:

> "*This rule does not limit the power of a court* to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., 1655, or *to set aside a judgment for fraud upon the court.*" (Emphasis supplied)

That this Court has the power to entertain this petition and to grant the relief requested has been considered and clearly approved by the Supreme Court of the United States. *Hazell-* [2] *Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250 (1944); *Shawkee Manufacturing Co. v. Hartford-Empire Co.*, 322 U.S. 271, 88 L.Ed. 1269 (1944). In *Hazell-Atlas, supra,* a somewhat similar case to the questions raised herein involving after-discovered fraud, the United States Court of Appeals for the Third Circuit had permitted the filing of a petition in the nature of a bill of review by Hazell-Atlas some nine years after final judgment had been entered against it concerning a patent. The petition was considered by the Circuit Court upon Affidavits of the parties and denied on the grounds that the fraud was not newly discovered, that the fraud was not the primary basis of the earlier final judgment and third, the Court lacked the power to set aside the judgment because of the expiration

of the term during which the earlier judgment had been rendered. The Supreme Court reversed the judgment of the Circuit Court and ordered it to issue a mandate to the District Court directing it to set aside its judgment entered pursuant to an earlier Court of Appeals mandate holding, at 322 U.S. 224:

> "From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry."

[3] and that relief will be granted:

> "where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable'."

In respect of the Judgment of the Circuit Court that the after-discovered fraud was not basic to the earlier judgment, the Supreme Court held that, although the after-discovered fraud did not impress the Circuit Court, it is impossible to accurately appraise the influence that the fraudulent article exerted on the judges and that such an appraisal was not necessary since Hartford had prevailed in the Court where the fraud had been perpetrated. Finally, the Supreme Court, addressing itself to whether or not Hartford's fraud fell short of that which prompts equitable intervention and whether Hazell had exercised proper diligence in uncovering the fraud, stated at 322 U.S. 246 as follows:

> "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant.

> It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice [4] be not so impotent that they must always be mute and helpless victims of deception and fraud."

The following parts of this petition will show clearly to this Court that the fraud perpetrated by Respondent amounted not only to an injury to the petitioner, but that it is a wrong against this Court, an institution set up to protect and safeguard the public. Surely, public welfare demands that this Court not be a helpless victim of deception and fraud.

[5]

II

STATEMENT OF THE CASE

A General

On January 7, 1960, the assignee of the petitioner-appellant, one C. W. Kinnear, pro se, filed with the Clerk of this Court in Appeal No. 16,780 a pleading styled "Notification to the United States Court of Appeals for the Fifth Circuit and the Honorable Judges Thereof, That the Judgment in This Case is Illegal and That a Contest Still Remains" (Ex. 1). Attached to the said Notification was, among other pleadings, a copy of a petition for application for order for recall and/or stay of mandate and/or final judgment (Ex. 2) filed by Mr. Kinnear, pro se, in the Supreme Court of the United States on January 7, 1960, the allegations and/or averments of which have

not been acted upon, except the ordered filing thereof. The thrust of the said petition was that Mr. Kinnear had discovered, subsequent to trial in the United States District Court and the conclusion of the appellate proceedings in this Court in the within appeal, that the United States District Judge, Lamar Cecil, now deceased, owned capital stock in the respondent-appellee corporation (hereinafter respondent) and had other business interests and relationships with the [6] corporate respondent and that such relationships, having not been divulged by either Judge Cecil or the respondent to the petitioner during the pendency of the action in the lower court before Judge Cecil or during the appellate proceedings in this Court, went beyond mere disqualification and amounted to a fraud and/or conspiracy to defraud the Federal District Court and this Honorable Court and had denied to petitioner its entitlement to due process of law. The said petition also averred perjury in the lower court on the part of respondent's executives, witnesses and agents concerning the introduction in evidence in the lower court of altered and/or changed evidence.

Although Mr. Kinnear's said pro se petition contained some intemperate and unwarranted terms and references, in particular, with reference to the Federal Court, it is respectfully asked that such terms and references be overlooked in light of the fact that Mr. Kinnear was personally involved in the litigation and the fact that he was appearing pro se without training in the law and that this Court look to the substance of that petition rather than to its form.

The first notice of any kind concerning the business relationships and interests between Judge Cecil and the

respondent came to Mr. C. W. Kinnear's attention for the first time on October 9, [7] 1959, when there happened to come to his attention the appraisement of the estate of Judge Cecil (Ex. 3), which disclosed that, at the time of his death, Judge Cecil owned a stock interest in Standard Oil Company of New Jersey, then principal owner of the stock of the respondent, valued at $399.00 and a $250.00 interest in the Amelia Gas Unit No. 1 under a gas pooling agreement in which the respondent was the operator (Ex. 4).

By order dated January 13, 1960, this Court ordered M. C. W. Kinnear's said Notification and attachments be filed with the Court, "but that *no action thereon be taken unless and until otherwise ordered* by the Supreme Court of the United States or *by this Court*".

On May 15, 1960, Mr. C. W. Kinnear reassigned all rights and interest in and to the patents involved in this appeal, including his rights in and to this litigation, back to the original Appellant and now petitioner (Ex. 5).

This petition will show this Court the facts and matters uncovered by Mr. C. W. Kinnear, the petitioner and its attorneys subsequent to the filing by Mr. C. W. Kinnear of his said Notification in this Court, which this petitioner alleges clearly demonstrate that a fraud was commenced in the United States District Court for the Eastern District of Texas, in Civil Action [8] No. 2363, was of a continuing nature and was in effect perpetrated upon this Court during the pendency of all previous matters considered by this Court in Appeal No. 16,780. However, before outlining the specific acts and matters as aforesaid, petitioner believes it to be of extreme importance that this Court bear in mind that when Mr. C. W. Kinnear filed

a motion in the Supreme Court of the United States, pro se, as amicus curiae, for leave to file an Amicus Curiae Brief alleging that Judge Cecil was, at the very least, disqualified because of his two, by subsequent comparison, relatively minor dealings with the respondent as revealed by the appraisement of his estate (Ex. 6), ..e respondent, by its attorneys, filed an objection to Mr. Kinnear's said motion in the Supreme Court (Ex. 7) and said as follows:

> "Little need be said concerning Kinnear's attack upon the integrity of Judge Cecil, now deceased. The only showing Kinnear makes of a connection between Judge Cecil and the respondent is (a) that Judge Cecil owned some stock in Standard Oil Company of New Jersey (a corporation affiliated with Respondent by majority stock ownership), and (b) that Judge Cecil, along with a number of other royalty owners, executed a pooling agreement with Respondent and Gulf Oil Corporation, the operators of certain oil and gas leases in the Amelia Field, Jefferson [9] City, Texas. The utter preposterousness of Kinnear's claim that Judge Cecil was disqualified is illustrated by the fact that his stock interest is Standard Oil Company of New Jersey was valued by his estate at $399.00 and consisted of 8 shares out of 215,000,-000 shares of the corporation's stock outstanding, while Judge Cecil's royalty interest in the Amelia Gas Unit No. 1, the subject matter of the above-mentioned pooling agreement was valued at a mere $250.00."

At no time did the respondent reveal to the Court, or any other Court in which this litigation has been considered, any of the matters or facts which will be shown to have existed prior to respondent's objection in the Supreme Court from which the above quote was taken. Then, the above-quoted passage by respondent in the Supreme Court

of the United States can only be considered as a tacit, fradulent misrepresentation to that Court since there can be no question but it knew of all the relationships, dealings and interests between Judge Lamar Cecil and itself at all stages of the litigation considered by this Court in Appeal No. 16,780.

Since Judge Cecil is now deceased, there is no way he can be questioned to determine his state of mind and, accordingly, in this regard, the record must speak for itself. However, there can be no question but that Judge Cecil was keenly aware of a [10] problem of conflict involved in his sitting as judge in Civil Action No. 2363. By affidavit of Judge Cecil's widow, Mary Reid Cecil, dated January 24, 1961, (Ex. 8), which was filed by Respondent in this Court in this Appeal on January 26, 1961, Mrs. Cecil stated that she invested certain of her monies in a purchase of 50 shares of the respondent's capital stock in the year 1954. Although she could not recall in whose name the stock was originally issued when purchased, she contended that it was her separate property purchased by her separate funds. In 1951, the Affidavit reveals, she obtained an additional 50 shares as a result of a stock split. Mrs. Cecil's Affidavit goes on to state that shortly after her husband qualified as a United States District Judge in 1954, he became aware of the existence of Civil Action No. 2363 between the petitioner and the respondent then pending in the United States District Court for the Eastern District of Texas. She stated that he *then* told her she would have to sell her 100 shares of the respondent's stock, but that she protested. Thereafter, she states, from time to time he urged her to sell the stock and finally became insistent that she do so and that she would have to sell

the stock in order to avoid embarrassment or criticism. Finally, she states in her Affidavit [11] that she did sell her 100 shares of the respondent's stock in January, 1955. Although the exact value of the stock of the respondent, owned by Judge Cecil and/or his wife, Mary Reid Cecil, is not known prior to its sale in January of 1955, it is known that the said 100 shares of respondent's stock, which were then registered in Mrs. Cecil's name, were sold for approximately $9,276.75. More will be said about this stock ownership later in this petition, but it is clear that Judge Cecil was aware of the problem of conflict by virtue of his insistence that Mrs. Cecil sell her stock in the respondent corporation and that he felt strongly enough about trying Civil Action No. 2363 to put pressure upon his wife to sell almost $10,000.00 worth of stock. Obviously, the alternative to the selling of the stock of the respondent by Mrs. Cecil was for Judge Cecil to disqualify himself or, at the very least, disclose the stock ownership in open court to all parties concerned, which the record will show he did not do. Additionally, the relationships, dealings, etc., hereinafter to be disclosed, in many instances again make Mrs. Cecil's stock ownership in the respondent appear relatively small. Petitioner is not able to determine why Judge Cecil did not also discuss with his wife all of these other relationships, dealings, [12] etc., unless, of course, this Court can conclude that he believed that the stock interest in the respondent was the one most easily discoverable. In light of the foregoing, the statement of this case can be summarized as a request of this Court to hear, consider and determine whether or not the relationships, business dealings and interests between Judge Lamar Cecil and the respondent during the pendency of this litigation in the

United States District Court and in this Court, which relationships, business dealings and interests were not revealed to the Court and the petitioner or, at the very least, make the enforcement of the judgment by this Court in this appeal "manifestly unconscionable" so as to require this Court to grant the relief requested.

B Chronology of Relevant Orders, Decrees and Proceedings in the United States District Court for the Eastern District of Texas in Civil Action No. 2363 Before the Honorable Lamar Cecil, Presiding Judge, and in This Court in Appeal No. 16,780

Before outlining the various relationships, business dealings and interests between Judge Cecil and the respondent, it is believed that a short chronology of pertinent orders, decrees and proceedings in the District Court and in this Court, as reflected [13] in the record in this Court in this appeal, will assist this Court in this appeal, will assist this Court in determining the existing and continuing blatant disqualification of Judge Cecil to act as trial judge in Civil Action No. 2363 and the continuing fraud upon this Court by the existing and continuing hidden and fraudulent relationship between Judge Cecil and the respondent.

1. United States District Court for the Eastern District of Texas, Civil Action No. 2363.

(1) Ordered Pre-trial Conference September 16, 1954.

(2) Held Pre-trial Conference October 4, 1954.

(3) Made order on written interrogatories for Defendant October 6, 1954.

(4) Order October 25, 1954, granting leave of Homer T. Bouldin to withdraw as Attorney for Plaintiff.

(5) Order overruling in part and sustaining in part Defendant's Objections to Plaintiff's Interrogatories served July 21, 1954.

(6) Second Pre-trial Conference November 12, 1954.

(7) Order December 20, 1954, directing clerk to release to Attorney or record for Defendant the Clerk's copy of transcript of proceedings of Pre-Trial Hearing.

[14]

(8) Order December, 1954, setting trial for hearing January 17, 1955.

(9) Order January 10, 1955, denying Plaintiff Kinnear-Weed Corporation's motion for trial by jury.

(10) Plaintiff's second jury demand filed with Plaintiff's First Amended Complaint January 14, 1955. Judge Lamar Cecil denied Plaintiff's second demand for Trial by Jury January 17, 1955, in open Court.

(11) Judge Cecil held all day Court session January 17, 1955, and re-set case for trial February 28, 1955.

(12) Trial February 28, 1955, through April 2, 1955.

(13) Judge Cecil Signed, ordered and entered Defendant Humble-Texas proposed findings of fact and conclusions of law September 28, 1956.

(14) Judge Cecil Signed, ordered and entered Judgment for Defendant Humble-Texas October 10, 1956.

(15) Judge Cecil Denied Plaintiff-Kinnear-Weed Corporation's Motion for a New Trial January 7, 1957.

2. United States Court of Appeals for the Fifth Judicial Circuit, Appeal No. 16,780.
[15]

(1) This Court entered its original Opinion and Judgment September 22, 1958, for Appellee and Against Appellant.

(2) Appellant filed its first Petition for a Rehearing in season, which was denied by this Court April 30, 1959. This Court made a new Supplemental Corrected Opinion in its said order of April 30, 1959. But, did not make a new Corrected Judgment.

(3) Appellant filed its second Petition for a Rehearing presented May 21, 1959, which was permitted to be received and filed by this Court and denied July 8, 1959.

(4) This Court stayed the mandate to allow Plaintiff-Appellant to file a Petition for Writ of Certiorari in The Supreme Court, which Petition was filed in the Supreme Court September 28, 1959, and docketed as No. 435 October Term, 1959.

(5) This Court entered a Supplemental Opinion and Corrected Judgment May 17, 1961.

[16]

C Business Dealings, Relationships and Interests Between the Honorable Lamar Cecil and the Respondent Humble Oil & Refining Company through Coastal Tool Company, Incorporated

1. In 1945 Judge Cecil purchased 15 shares of stock of Coastal Tool Company, Inc., a Texas corporation doing business in and about Beaumont, Texas, serving the oil well industry, for a purchase price of $10,000.00. The 15 shares represented a one-fourth ownership of the entire outstanding shares of Coastal stock at the time of their purchase by Judge Cecil and he retained those shares, constituting at all times a one-fourth interest, until his death on February 14, 1958. During the entire time that Judge Cecil owned Coastal stock, he was an officer and director of Coastal, receiving a salary, director's fees and enormous dividends. All of the information hereafter revealed concerning Judge Cecil's relationship with Coastal is taken from the sworn oral depositions of W. M. Schultz and Mary Reid Cecil, (Ex. 9, 10 and 18) in Civil Action No. 63-H-509 in the United States District Court for the Southern District of Texas, Houston Division, styled Kinnear-Weed Corporation, Plaintiff v. Humble Oil & Refining Company, et al, Defendants.

[17] The following is a breakdown, to the extent ascertainable by the petitioner, of Judge Cecil's dividends, salary and director's fees from Coastal from 1945 through 1957:

Year	Dividends	Salary	Director fees
1945 up to 1951, amount not known to Petitioner-Appellant			
1951	$5,500.00	$3,108.84	$600.00
1952	3,750.00	3,108.84	600.00
1953	3,750.00	3,108.84	600.00
1954	3,750.00	3,108.84	600.00
1955	3,750.00	3,108.84	600.00
1956	3,750.00	3,108.84	600.00
1957	2,500.00	3,108.84	600.00
1958 Judge Cecil died February 14, 1958			
1958 Stock sold by widow Mary Reed Cecil 1959			
Totals	$26,750.00	$21,761.88	$4,200.00
		Total Dividends	$26,750.00
		Total Salary	21,761.88
		Total Director Fees	4,200.00

As can be seen from the above chart, Judge Cecil received [18] dividends, salary as an employee and director's fees from Coastal during the entire time that he was a Federal Judge and during the entire pendency of this litigation before him and in this Court, until his death on February 14, 1958.

The respondent was a substantial customer of Coastal during the entire pendency of this litigation through at least 1959. The following chart shows the gross amount of business of Coastal during the years 1953 through 1959 and that part of the gross business of Coastal attributable to the respondent. This information was taken from the deposition of Mr. W. M. Schultz (Ex. 9) and Mary Reed Cecil (Ex. 10 and 18) and is the best information your petitioner, at this time, is able to ascertain, since a sub-

poena for the records of Coastal in Civil Action No. 63-H-509 was quashed in open Court by District Judge Honorable Joe Fisher for the United States District Court in and for the Eastern District of Texas, Beaumont Division:

[19]

Year	Amount of Gross Business	Amount of Business Attributable to Respondent
1945 up to 1953, amount unknown to Petitioner-Appellant		
1953	$225,872.23	$51,614.06
1954	204,608.83	42,668.53
1955	202,599.93	29,414.14
1956	242,534.57	21,834.42
1957	209,995.71	25,276.60
1958	113,881.77	15,398.83
1959	117,618.35	20,543.34
Totals	$1,317,111.39	$206,749.92

It can be seen, therefore, that slightly more than 16% of the monies received by Judge Cecil from Coastal, from all sources, from before the institution of Civil Action No. 2363 and during the entire pendency of that case in the United States District Court and in this Court in Appeal No. 16,780, until his death in February, 1958, is directly attributable to the respondent.

There can be no question but that Judge Cecil was aware of the importance of respondent's business patronage of Coastal since he was not only an Officer and director, but an employee and counsel to Coastal from

the date of the purchase of his interest [20] therein until the date of his death. Yet, at no time did Judge Cecil ever divulge to petitioner or to this Court the fact that he maintained such an active day-to-day business relationship while he was a Federal Judge. There can be no question but that this relationship alone would convince any judge that honest dealing with the Court and the parties litigant would require that such a relationship must, at a minimum, be divulged to all interested parties, and, at best, require his complete disqualification. Mrs. Cecil's Affidavit (Ex. 8) shows us that Judge Cecil was highly concerned over her stock interest in the respondent, which interest is easily discernible upon corporate books by any stockholder. The question now remains, why wasn't Judge Cecil equally concerned over the more substantial direct business dealings that he maintained with the respondent through Coastal Tool Company, Inc.?

[21] 2. Bryan D. Beck, Jr., et al
v. Humble Oil & Refining Company,
a Texas Corporation, et al.

On March 9, 1953, Bryan D. Beck, Jr., Lamar Cecil (Judge Lamar Cecil) and four of Judge Cecil's relatives by marriage, Randolph C. Reed, A. E. Sheppard, Fletcher Graham, III, and Mrs. H. M. Sheppard as plaintiff, brought suit against the respondent and others in the 75th Judicial Court of Texas in Chambers County, Texas. The original petition in that case was filed in that Court on March 9, 1953, and designated Case No. 3988. The original petition demanded damages in the approximate amount of $400,000.00 for failure of the defendants to properly develop leases and for oil and gas drainage. After a series of amended petitions were filed, a Fourth Amended

Petition was filed in that Court eliminating all defendants except Humble Oil & Refining Company, the respondent herein, and reducing the claim for damages to $306,771.08 (Ex. 11). The case proceeded to trial before a jury on February 2, 1954, on the fourth amended original petition and terminated with a hung jury on February 16, 1954 (Ex. 12).

Not only was Lamar Cecil (Judge Lamar Cecil) a plaintiff in the said case, he also was an actively participating attorney [22] on behalf of all of the plaintiffs. One John H. Benckenstein, Esquire, an attorney at Beaumont, Texas, was the principal attorney of record for the plaintiffs as can be seen from his signature on Exhibit 11 and Exhibit 12, the latter being the apparent settlement agreement reached between the parties. However, Lamar Cecil did, in fact, participate as an attorney in the trial as evidenced by the testimony of Mr. Benckenstein on pages 10 and 11 in his oral deposition in the previously referenced Civil Action No. 63-H-509 and its companion case Civil Action No. 64-H-354 (Ex. 13, p. 10, 11).

The principal attorney on behalf of, the defendant, Humble Oil & Refining Company, respondent herein, was Walter B. Morgan, Esquire, a staff attorney for the respondent at that time and now General Counsel of the respondent. As such, his signature appears on Exhibit 12.

While this case in the 75th Judicial District of Texas was awaiting a new trial, Lamar Cecil qualified as a Federal District Judge for the Eastern District of Texas in September of 1954. Commencing at approximately that time, the plaintiffs and the only then defendant, the respondent herein, commenced settlement negotiations as

evidenced by correspondence between [23] Mr. Benckenstein and Mr. Walter B. Morgan (see Deposition Exhibits 4, 5, 6, 7, 8, 9, 11 and 12 of Ex. 13 attached hereto). This series of settlement correspondence extends from September 1 through February 1, 1955. During this time, Judge Lamar Cecil had assumed jurisdiction over Civil Action No. 2363, the litigation out of which this appeal arose and had held several hearings and entered many orders affecting the rights of the petitioner as reflected, *supra,* in Section II B 1.

Although the order entered in *Bryan D. Beck, Jr.,* by District Judge P. C. Matthews on February 2, 1955, ordered that the plaintiffs take and recover nothing by their suit and that the costs of the Court were to be paid by plaintiffs, the settlement agreement (Ex. 12) shows that Humble Oil & Refining Company agreed to reimburse the plaintiffs in the amount of $5,192.60 purportedly to cover the expenses of the litigation incurred by the plaintiffs in the prosecution of the case. The petitioner has no way of knowing how much money passed between Humble Oil & Refining Company and the plaintiffs in that case as the true settlement amount since the respondent, upon request by the petitioner, refused and/or has been unable to produce its check for $5,192.60. In any event, however, petitioner can determine [24] that Judge Lamar Cecil took as an attorney fee in the *Bryan D. Beck, Jr.,* case at least either $1,250.00 or $250.00, in violation of 28 U.S.C. Sec. 454, sometime subsequent to February 2, 1955, as reflected by Deposition Exhibits 5 and 6 to Ex. 13, attached hereto, and as reflected by the date of the settlement agreement Judge Lamar Cecil signed as a party on January 31, 1955, by which time Judge

Cecil had entered many orders in Civil Action No. 2363, had twice denied petitioner's jury demands and had on January 17, 1955, reset that case for trial on February 28, 1955.

It is particularly important that this Court realize that the attorney for the defendant, Humble Oil & Refining Company, in the case *Bryan D. Beck, Jr.*, Mr. Walter B. Morgan was actively participating in the pretrial proceedings in Civil Action No. 2363 before Judge Cecil while he was at the same time the principal attorney for Humble Oil & Refining Company in the *Beck* case negotiating a settlement involving substantial interests in a case where Judge Cecil was a plaintiff at all times and was an attorney for the plaintiffs until his appointment to the bench.

There can be no doubt whatsoever that Judge Cecil, at the time he was acting as Judge in Civil Action No. 2363, was [25] acutely aware of the substantial proceedings in the *Bryan D. Beck, Jr.*, case, yet at no time did he or the respondent advise this petitioner of the pendency of that litigation and the proposed settlement and settlement thereof, nor was the District Court or this Court ever advised of the existence of the Beck proceedings. The question is then, why did not this conflict bother Judge Cecil to the extent that he would find it embarrassing or that he would consider himself subject to criticism? There can be no question but that this conflict clearly violates the provisions of 28 U.S.C.

455 as a result of Judge Cecil's relationship in connection with Humble Oil & Refining Company and the attorney for Humble Oil & Refining Company in both the *Beck* case and Civil Action No. 2363. This set of circumstances is one which is ripe for undue pressures and fraudulent actions by Judge Cecil and/or the re-

spondent herein. This Court should use its powers to fully investigate the circumstances of the *Beck* case in order to determine just how large a settlement was, in fact, paid by the respondent to the plaintiffs in that case, or otherwise.

The *Beck* case did not come to the attention of the petitioner until on or about February, 1966, when Mr. C. W. Kinnear, president and a director of the petitioner, received information as [26] to its existence. Mr. C. W. Kinnear has executed an Affidavit concerning his discovery of the Beck case and it is attached hereto (Ex. 14). The Court is asked to carefully read Mr. Kinnear's Affidavit since it discloses an almost unbelievable set of circumstances concerning the official records of the Beck case. In substance, Mr. Kinnear's Affidavit states that he attempted to locate the file of the *Beck* case in the 75th Judicial District Court of Texas, but that the file was not in the Clerk's office. The only record in the Clerk's office was a small handwritten note, with no signature, disclosing that one Frank Turner, Esquire (now deceased) had removed the files of the *Beck* case from the Clerk's office. After diligent questioning of many persons and many miles of travel, Mr. Kinnear located the files of the *Beck* case at an abandoned farm house approximately fifty miles north of Houston, Texas. The file in that case has now been returned to the Clerk of the 75th Judicial District Court. Petitioner is unable to find any relationship between Mr. Turner and the *Beck* case and, therefore, cannot advise this Court as to why these files were put into the private files of Mr. Turner, (deceased), or why Mr. Turner would have removed all of the files of that case from the courthouse, where he had no connection with the case.

[27] However, the disappearance of this file and the circumstances of this case as outlined herein, can only lead to the conclusion that a concerted fraud was perpetrated by respondent upon the petitioner, the United States District Court and this Court to hide an illegal relationship between Judge Cecil and the respondent.

3. Stock Dividends and Oil and Gas Royalties, Bonuses and Rentals Received by Judge Lamar Cecil and/or his Wife, Mary Reed Cecil, from Humble Oil & Refining Company, Respondent

By Stock Certificate dated September 26, 1944, Lamar Cecil (Judge Lamar Cecil) purchased fifty shares of the capital stock of Humble Oil & Refining Company, respondent herein, represented by Stock Certificate No. NO35036 (Ex. 15). By Stock Certificate dated April 5, 1946, and numbered NO52591, the said fifty shares of respondent's stock were transferred to the name of Mrs. Mary Reed Cecil (Ex. 16). Thereafter, by Stock Certificate dated December 21, 1951, and numbered TO-103493, there was issued, in the name of Mrs. Mary Reed Cecil, an additional fifty shares of the respondent's stock by way of a stock split (Ex. 17). This stock was not sold by Judge Cecil and/or his wife until either January or February, 1955, just days before Judge Cecil conducted the actual trial of Civil Action [28] No. 2363, which was one month and eleven days after the original date set for trial (see Ex. 8).

In another sworn oral deposition of Mrs. Mary Reed Cecil in the said Civil Action No. 63-H-509 (Ex. 18), Mrs. Cecil avers that she purchased the original Stock Certificate, which was issued in the name of Lamar Cecil, from funds from her individual bank account in the First

National Bank of Beaumont, Texas (Ex. 18, p. 26). That bank account was opened by Mrs. Cecil in the 1930's and it is the same account into which she had deposited dividend income over the years commencing in 1930 (Ex. 18, p. 84). Since the dividends deposited to Mrs. Cecil's account were community property and were commingled from time to time with other funds in that account, the entire account became community property under the law of Texas and, accordingly, the purchase of the Humble Oil stock in 1944, irrespective of whose name appeared on that Certificate, was the community property of Judge Cecil and Mrs. Cecil, as were the shares of stock resulting from the stock split. Although Mrs. Cecil contends that this stock was always her separate property, the facts do not bear out this contention and she should be called by this Court to prove that the stock was, in fact, her [29] individual property since the burden is upon her and/or respondent to do so. *Duncan v. U. S.*, 247 F.2d 845 (5th Cir. 1957).

Irrespective of stock ownership, Judge Cecil was required to divulge the existence of this interest in the respondent to the petitioner in order to conform with the elementary standards of judicial integrity and fair play. He did not disclose the existence of the stock. Although Mrs. Cecil has been requested by petitioner to produce the check with which she claims she purchased the respondent's stock, she has not done so.

Lamar Cecil, Mrs. Lamar Cecil, T. S. Reed (Mrs. Cecil's father), Randolph C. Reed (Mrs. Cecil's brother), Ruby Reed (Mrs. Cecil's sister), (now Ruby Reed Graham, III) and others on August 19 purchased approximately eighty thousand acres of land located in Newton, Jasper, Liberty and Orange Counties, Texas

and through Earl C. Hankamer, Agent, which agency is reflected in assignment (Ex. 19-A) dated September 4, 1937. Thereafter, as owners, they executed over the years a number of oil and gas leases with the respondent herein on various parts of the said eighty thousand acre tract of land on which many oil and gas wells were drilled. The leases are as follows:

1. August 19, 1937 - 42,053 acres (Ex. 20)

[30] 2. August 19, 1937 - 147.6 acres (Ex. 21)

3. May 18, 1949 - 2,005 acres (Ex. 22)

4. February 25, 1952 - 4,727 acres (Ex. 23)

5. March 24, 1953 - 640 acres (Ex. 24)

6. November 20, 1954 - 237.7 acres (Ex. 25)

7. November 14, 1956 - 18.545 acres (Ex. 26), (Approximately one month after Judge Cecil rendered his judgment October 10, 1956, in Civil Action No. 2363 and January 7, 1957 denied Petitioner-Appellant's motion for a new trial pending as of November 14, 1956).

8. March 12, 1957 (petitioner preparing to file briefs in this Court) 4,320 acres (Ex. 27)

9. June 1, 1957 (this appeal pending in this Court) 3736 acres (Ex. 28)

10. April 13, 1960 - 1,763 acres (Ex. 29)

Without computing the bonuses, rentals, royalties and possible stock dividends received by Mrs. Cecil's close relatives from respondent, Judge Cecil and/or Mrs. Cecil received the following dividends, bonuses, rentals and

royalties directly from the respondent or through their agent from 1951 through 1963:

[31]

Year	Dividends	Bonuses	Rentals	Royalties
1951	$225.00	——	——	$702.83
1952	228.00	——	——	582.08
1953	228.00	royalties not computed		
				860.00
1954	114.00	——	——	812.00
				1331.82
1955	——	——	——	865.00
				1114.36
1956	——	$3528.45	——	895.89
1957	——	8219.42		665.36
		9541.76		1200.63
		8238.78		
				1036.85
1958	——	——	——	848.58
1959	——	——	——	2843.97
				632.73
1960	——	5590.60	——	884.76
1961	——	——	——	889.64
1962	——	——	——	1519.34
1963	——	1344.17	——	1474.99
	$795.00	$36,463.18	——	$21,167.11

Total Dividends	$ 795.00
Total Bonuses	36,463.18
Total Royalties	21,167.11
Total from 1951 through 1963	$58,425.29

[32] The above chart was prepared from tax information attached as Deposition Exhibits to Exhibit 10 attached hereto.

4. Judge Lamar Cecil and/or His Wife Maintained Extensive Business Relationships With the Oil and Gas Industry Other Than the Respondent Herein

From the appraisement of Judge Cecil's estate (Ex. 3), Judge Cecil, at the time of his death, owned stock interest in the following companies during his lifetime, such stock having a value as indicated as of the time of his death:

Name of Oil Companies in which Judge Lamar Cecil Owned Stock	Value of Stock Owned by Judge Lamar Cecil
Humble Oil & Refining Company	$ 9,276.75
Standard Oil Company (New Jersey)	399.00
Standard Oil Company of Indiana	3,625.00
El Paso Natural Gas Company	11,252.00
Tennessee Gas and Transmission Company	14,850.00
Middle States Petroleum Company	925.00
Equitable Gas Company	2,963.00
United Carbon	10,750.00
Total -	$54,040.75

[33] Gulf Oil Corporation (from tax information Ex. 10 capital worth not known) .....
Judge Lamar Cecil and/or his wife received total discoverable income from lease options, bonuses, rentals and royalties from the oil and gas industry (without reference to many thousands of dollars in dividends from stock ownership in any oil and gas companies which can be found in the tax information attached as deposition exhibits to Exhibit 10 attached hereto) from the years 1951 to 1963:

Year	Amount
1951	$ 8,269.93
1952	9,071.05
1953 not known	- - -
1954	20.199.05
1955	17,134.02
1956	55,045.84
1957	75,615.69
1958	24,956.84
1959	36,122.86
1960	35,592.28
1961	41,995.87
[34] 1962	31,740.58
1963	34,400.53
Total	$39,143.53

The above chart was prepared from Deposition Exhibits attached to Exhibit 10 attached hereto. None of the foregoing figures come close to indicating the increase in net worth of Judge Lamar Cecil and/or wife from 1951 through 1963 as a result of the appreciation of the value of the previously-mentioned eighty thousand acre tract of land by the drilling of wells thereon by Respondent and others, but Petitioner on reliable information believes said net worth to be far in the excess of $1,000,-000.00 which this Court should investigate.

Petitioner is aware of many other leases entered into by Judge Cecil and his wife with oil companies other than the respondent on the said eighty thousand acres, but that such leases are too voluminous to attach hereto, but they will be produced by petitioner should this Court grant a full hearing as requested in this petition.

[35]

5. Lamar Cecil and his Wife, Mary Reed Cecil, Made Incorrect Income Tax Report For The Year of 1956 which Failed to Fully Disclose Judge Cecil's Business Dealings and Relationships With Respondent.

Petitioner has been able to get information from the income tax reports of Lamar and Mary Reed Cecil (deposition exhibits to Ex. 10) and respondent's books and accounts to advise this Court that it should issue an order for the books, accounts and papers of Lamar Cecil, his wife, Mary Reed Cecil and respondent to effectively determine the aspect of fraud and/or conspiracy perpetrated upon the District Court below and this Court. The item in question is $3,528.45 listed in the income tax report of Lamar Cecil and his wife, Mary Reed Cecil as their part of the proceeds of the Geological survey and Seismograph Shooting Option on the 18,545 acre lease agreement, dated November 14, 1956, (Ex. 26) between Lamar Cecil, his wife, Mary Reed Cecil, his brother-in-law, Randolph C. Reed, his sister-in-law, Ruby Reed Graham and her husband, Fletcher Graham, III and others with respondent, which agreement was consummated between the date of the judgment October 10, 1956, in the District Court below in Civil Action No. 2363 and the time of that Court's order denying petitioner-plaintiff's motion for a new trial by order [36] dated January 7, 1957. This item is listed as having been received from Slick Oil Company when in fact this item of income was received by Judge Cecil and Mrs. Cecil from the respondent through the Cecil's agent Hankamer Investment Company (see Ex. 26).

The foregoing Sections II C 3, 4 and 5 of this petition disclose direct business relationships between Judge Cecil, his wife and Mrs. Cecil's close relatives with the respondent herein prior to, during and after the trial of Civil Action No. 2363 and the proceedings on Appeal No. 16,780 in this Court to an extent that make even the ownership of 100 shares of Humble stock a relatively insignificant conflict of interest. Again, the question arises, why was Judge Cecil insistent upon the selling of the respondent's stock and yet, as far as petitioner is able to ascertain, was willing to proceed through the entire trial of Civil Action No. 2363 without disclosing his other very substantial direct dealings with the respondent and an additional segment of the entire oil and gas industry, which he protected from being sued by Petitioner by fraudulent judgment in Civil Action No. 2363.

6. Lamar Cecil and/or his Wife, Mary Reed Cecil, Were Joint Operators With Others in Drilling Wells Using the Same Type Drill [37] Bits in Issue Before Judge Cecil in Civil Action No. 2363 Which Were Claimed as the Type Drill Bits to be an Infringement of the Claims of Petitioner's Kinnear Patents

These wells are reflected in the income tax reports of Lamar Cecil and Mary Reed Cecil attached as Exhibit 10. The wells in question are wells drilled by Lamar Cecil and/or his wife, Mary Reed Cecil, his father-in-law, T. S. Reed, his brother-in-law, Randolph C. Reed, his sister-in-law, Ruby Reed Graham and her husband, Fletcher Graham, III. This Court should order the books, accounts and well drilling reports of the persons named above, and, Mr. Byron Meredith, Meredith and Company and/or Meredith & Company, Mr. H. E. Dishman,

Sun Set International Petroleum Corporation and its employees, Mr. Jim Heid, Earl C. Hankamer, Raymond Hankamer and Hankamer Investment Company, all of who have personal knowledge, books, accounts records and drilling reports that will reflect the type and make of drill bits in question used on the wells in question, which are the same type and makes of drill bits that were claimed to infringe petitioner's patent in Civil Action 2363 in suit, one of the issues before Judge Cecil. The patent in question, No. 23,416 issued October 16, 1951, and its expiration date was July 10, 1962, and interim time between the said [38] two dates, is when said bits were used. By the judgment of the District Court below, Judge Cecil and/or his wife, Mary Reed Cecil, and his close relatives named above were freed and protected from being sued for the infringement of said patent because said judgment held the said patent invalid and void and not infringed by respondent in its judgment dated October 10, 1956, in the District Court below.

This financial involvement of Judge Cecil and his wife with the entire oil industry becomes particularly significant in light of his findings of Fact No. 86 set out at 150 F.Supp. 158 in which Judge Cecil found that the entire oil industry was "affected by and concerned with the validity of the claims of this patent".

It is believed by your petitioner that, upon a hearing as requested by this petition and with the power of this Court to subpoena records of the respondent, it will be able to show that respondent and the additional segment of the entire oil and gas industry was, in fact, using the alleged infringing bits (the issue before Judge Cecil) in well drilling on land under lease to it and them by Judge

Cecil and his wife and others before, during and after the trial of Civil Action No. 2363.

[39] D Defendant's Exhibit D31 Introduced Into Evidence During the Trial of Civil Action 2363

The petitioner herein now has reason to believe that Exhibit D31 introduced into evidence by defendant in Civil Action No. 2363 was spuriously and fraudulently machined and altered at the behest of the respondent in an attempt to show, as prior art, the same patent claims involved in Civil Action No. 2363. Although the petitioner is unable to give this Court, at this time, all of the information at its command, since a great deal of it is presently hearsay concerning this matter, it does refer the Court's close attention to the deposition of Mr. F. B. Sparks, a machinist with the Hughes Tool Company, which deposition was taken in Civil Action No. 1706-62 in the United States District Court for the District of Columbia in *Kinnear-Weed Corporation v. Humble Oil & Refining Company, et al* (transferred to the Southern District of Texas and now designated C.A. No. 64-H-354) (Ex. 30).

In particular, the Court's attention is called to the fact that Mr. Sparks was unknown to petitioner during the trial of Civil Action No. 2363 and its subsequent appellate proceedings, but that when his name came to the attention of petitioner and his deposition was noted without any disclosure as to the subject matter [40] thereof, Mr. Sparks was called to the Humble Building in Houston to consult with the attorneys for respondent and, apparently, the only thing discussed was Exhibit D-31. In his deposition Mr. Sparks said, starting at page 22, that

although he had never seen an old three cone bit, he just asked Humble lawyers to show him a picture of the old Hughes three cone bit because he just had a "curiosity" about it.

It is earnestly believed by petitioner that the cones of the said D-31 bit were remachined and the water courses were relocated so that it would, in substance, attempt to show and/or anticipate the claims of petitioner's patent. Petitioner has been advised by a competent metalurgist that scientific tests can clearly disclose any such alteration to the spurious bit D-31 and the approximate time such alteration was made.

Petitioner believes that at a full hearing of this matter, it can convince this Court to order an impartial metalurgical examination of D-31 and that such examination will prove beyond doubt that it is a spurious, fraudulent item of evidence and that its introduction into Civil Action No. 2363 alone should convince this Court that there has been a fraud perpetrated upon the Courts of the United States by the respondent.

[41] III

Argument

The petitioner will not make a lengthy argument because it believes that the best argument to be made is a demonstration to this Court of the facts concerning Judge Cecil's substantial interests and dealings with the respondent and his now known relationship to an attorney for the respondent while he was conducting proceedings in Civil Action No. 2363.

Title 28, U.S.C., Section 455 reads as follows:

> "Any justice of judge of the United States shall disqualify himself *in any case in which he has a substantial interest,* has been of counsel, is or has been a material witness, *or is* so related to or *connected with any party or his attorney* as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. June 25, 1948, c. 646, 62 Stat. 908." (Emphasis supplied)

The wording of Section 455, above, makes it clear that a judge of the United States *shall* disqualify himself in any case in which he has a substantial interest or is so related to or connected with any party or his attorney so as to render it improper in his opinion for him to sit on the trial or other proceedings therein. [42] There can be no question but that Judge Cecil had a duty to at least disclose any and all of his relationships with the respondent and its attorneys so that the petitioner would have had knowledge and an opportunity to move for his disqualification. Additionally, it is petitioner's opinion that Judge Cecil was so substantially interested in the outcome of the proceedings in Civil Action No. 2363, as they related to the business of the respondent and the entire oil industry, that unless there were something to be personally gained by him through secrecy, he should have automatically disqualified himself under the requirements of Section 455. Further, there was a duty upon the respondent, in the interest of justice, to advise the petitioner and remind the Court of the interests and relationships between Judge Cecil and the respondent. Not only is this so, but respondent's attorneys stood mute in the courtroom before Judge Cecil in Civil Action No. 2363, and, with full knowledge that they themselves were setting a case, as attorney for respondent, with Judge Cecil and

authorizing payment of attorneys fees and expenses to Judge Cecil, and paying his cost obligations in said Case No. 3988. Nor did the attorneys for the respondent fully disclose the question of conflict of interest when it was raised in the Supreme Court by petitioner's assignee C. W. Kinnear. Rather, they chose to [43] belittle petitioner's assignee because of the size of the interest then discovered. If this is not a tacit, fraudulent misrepresentation when there is a duty to be candid, there certainly can never be a tacit, fraudulent misrepresentation.

Perhaps the case that comes closest to the instant circumstances is *In Re Honolulu Consol. Oil Co.*, 243 F. 348, 156 C.C.A. 128 (Cal. 1917), in which the question of the disqualification of a Federal District Judge came before the Circuit Court of Appeals for the Ninth Circuit. In that case the Federal District Judge owned 1,125 shares of stock in a defendant corporation. Even though those shares were sold during the litigation for the meager amount of $16.90, the Court of Appeals held that the judge was disqualified initially in the case and his disqualification could not be removed by the subsequent sale of his stock interest. Petitioner realizes that the wording of the then Federal Statute (Section 20 of the Judicial Code) was couched in terms of a federal judge being "concerned in interest", rather than terms of "substantial interest" as found in 28 U.S.C., Sec. 455. However, the Circuit Court in *Honolulu* refused to make "nice distinctions" as to the meaning of the phrase "concerned in interest" since it found that full justice could only be done by holding, under the showing made, that the [44] judge was sufficiently related to the litigation to impel the conclusion that he was concerned in interest and, there-

fore, disqualified. Also see *Coltrane, et al v. Templeton, et al,* 106 F. 376 (4th Cir.).

The silence of Judge Cecil and the respondent, when it was their duty to disclose their interests, relationships, associations and dealings, was a fraud. No recitation of authority is needed to convince this Court that fraud may be perpetrated by the failure to act as well as by an affirmative act. In light of the substantial interests, relationships, associations and dealings and the huge economic and political power of the respondent in this case, it can only be concluded that the petitioner was denied due process of law. In *Tumey v. Ohio,* 273 U.S. 510, 71 L. Ed. 749 (1927), the Supreme Court of the United States not only held that the minimum sum of $12.00 in costs received by a village trial magistrate disqualified him, but that the requirement of due process of law is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without the danger of injustice.

This petition has shown this Court that there was a clear awareness on the part of Judge Cecil and the respondent of the problem of conflict of interest and that both Judge Cecil and the [45] respondent took great pains to prevent the petitioner from discovering such conflicts of interest even after a minute portion thereof had come to light.

The petitioner was denied a fair trial by virtue of the disqualification of Judge Cecil and the consequent fraud and once denied a fair trial, it was *a fortiori* denied due process. As stated by the Supreme Court in the case of *Re: Murchison,* 349 U.S. 133, 136:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. * * * But to perform its high function in the best way 'justice must satisfy the appearance of justice'. (Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11)" (Emphasis supplied)

This Court will take judicial knowledge that the Supreme Court laid down the above rule in Murchison, Supra, after the new Rule deleting "concerned in interest" and adding "substantial interest".

Manifestly, justice has not satisfied the appearance of justice in these proceedings.

[46] WHEREFORE, YOUR PETITIONER PRAYS AS FOLLOWS:

1. That this Court order a full oral hearing of the matters raised herein and use its power to bring before it all those involved or effected so that all of the facts can be known to it;

2. That this Court enter a finding that the proceedings to date have resulted in a manifest injustice to the petitioner and a fraud upon the petitioner and all Federal Courts involved;

3. That this Court vacate all of its judgments heretofore entered in Appeal No. 16,780;

4. That this Court order the United States District Court for the Eastern District of Texas, Beaumont Division, to set aside and vacate the judgment in Civil Action No. 2363;

5. That this Court order the United States District Court for the Eastern District of Texas, Beaumont Division, to hold a new trial in Civil Action No. 2363;

6. That this Court find, determine and assess both compensatory and punitive damages in favor of the petitioner against the respondent;

7. That this Court award to petitioner against respondent reasonable attorneys fees, together with costs and expenses, incurred by petitioner in the trial of Civil Action No. 2363 and all proceedings thereafter brought as a result of the entry of judgment in said Civil Action;

[47] 8. That this Court hold a full hearing 'En Banc' at Houston, Texas, for the convenience of the Court, Petitioner, Respondent and any witnesses and matters it might wish to hear.

9. That this Court take such additional action as may be appropriate.

Respectfully submitted,

/s/ FRED PARKS
Fred Parks
1599 Houston Club Building
Houston, Texas 77002

/s/ WILLIAM E. KINNEAR
William E. Kinnear
Beaumont Savings Building
Beaumont, Texas 77701
Attorneys for
Petitioner-Appellant

DATED: DECEMBER 30,
1966.

Of Counsel

Arthur B. Hanson
W. Frank Stickle, Jr.
Hanson, Cobb, O'Brien and Tucker
888 Seventeenth Street, N. W.
Washington, D. C. 20006

[48] CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition with Exhibits, was served upon Respondent-Appellee by hand delivering a copy thereof to Garrett R. Tucker, Jr., Attorney of record in Appeal No. 16,780 for Respondent-Appellee, Esperson Building, Houston, Texas.

/s/ FRED PARKS
Fred Parks

STATE OF TEXAS)
) ss
County of Harris)

AFFIDAVIT OF C. W. KINNEAR

C. W. Kinnear, being duly sworn, upon oath deposes and says:

1. That he is of lawful age, a resident of Harris County, Texas, and that he makes this affidavit on personal knowledge, information and belief;

2. That he is the inventor of the inventions disclosed and claimed in United States Patent No. 2380112, dated July 10, 1945, and re-issue Patent 23,416, dated October 17, 1951;

3. That he is President and a Director and has always been President and a Director and one of the principal stock holders of Kinnear-Weed Corporation, a Texas corporation;

4. That he did extensive investigation of the facts, matters and things set out in the foregoing Motion and Petition with attached Exhibits;

5. That he has read and understands the facts, matters and things set out in said Motion, Petition, and Exhibits which are true according to his knowledge, information and belief.

C. W. KINNEAR
C. W. Kinnear

Subscribed and sworn to before me by said C. W. Kinnear, this 29th day of December, 1966; to certify which, witness my hand and seal of office on said date.

JANE LANE (SEAL)
Notary Public in and for
Harris County, Texas

APPENDIX C-3

[1]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,780

KINNEAR-WEED CORPORATION,
Petitioner,

vs.

HUMBLE OIL & REFINING COMPANY, ET AL,
Respondents.

RESPONSE TO MOTION OF PETITIONER FOR LEAVE TO FILE PETITION TO VACATE PRIOR JUDGMENTS AND MOTION TO STAY PROCEEDINGS PENDING IN THE DISTRICT COURT

Respondents, Humble Oil & Refining Company and Standard Oil Company, do not oppose Petitioner's Motion for Leave to File, nor the mere filing of, the Petition to Vacate judgment in Civil Action 2363,

etc. However, Respondents want to make it clear that they do oppose most vigorously said Petition to Vacate. In the event this Court permits said Petition to Vacate to be filed and considers same upon the merits, as requested in Petitioner's Motion for Leave to File, Respondents respectfully request the Court to grant Respondents a reasonable time within which to prepare and file a brief in opposition to said Petition to Vacate, which is replete with false accusations, statements in direct conflict with proven facts, and misleading statements as to the prior proceedings herein, including the complete omission of any reference to the [2] proceedings in this Court culminating in this Court's orders dated November 25, 1960 and March 15, 1961 (copies attached), rejecting motions of Petitioner seeking to vacate the judgment in C.A. 2363 on substantially the same grounds as those set out in the present Petition to Vacate, i.e., Judge Cecil's alleged disqualification because of claimed ownership of stock in and business relations with Respondent Humble, and alleged fraud by Respondent Humble and others in connection with a trial (D-31).

Regarding the Motion to Stay, we believe the matter is moot since, as Petitioner well knows, Judge Ingraham vacated the January 27, 1967 trial setting as soon as he learned of the filing of the present proceedings in this Court, there have been no proceedings in the District Court since that time and, to the best of Respondents' information and belief, no proceedings in the District Court are contemplated pending disposition of the matter in this Court.

Respectfully submitted,

GARRETT R. TUCKER, JR.
Attorney for Respondent
Humble Oil & Refining
Company,
Esperson Bldg.,
Houston, Texas.

C. O. RYAN
Attorney for Respondent
Standard Oil Company,
Gulf Bldg.,
Houston, Texas.

OF COUNSEL

Walter B. Morgan,
Melvin F. Fincke,
P. O. Box 2180,
Houston, Texas

I hereby certify that a copy of the above Response wes served upon Petitioner by depositing same in the United States mail, stamped and addressed to Fred Parks, 1599 Houston Club Building, Houston, Texas, 77002, on May 12, 1967.

GARRETT R. TUCKER, JR.
Garrett R. Tucker, Jr.

APPENDIX C-4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Filed May 18, 1967)

No. 16,780

KINNEAR-WEED CORPORATION,
Petitioner-Appellant,

versus

HUMBLE OIL & REFINING COMPANY, A Texas Corporation (now dissolved and merged into Standard Oil Company, a New Jersey Corporation) its successor and/or surviving corporations and its assigns,
Respondent-Appellee.

ON PETITION FOR REHEARING, ETC.

Before TUTTLE, Chief Judge, JONES and SIMPSON, Circuit Judges.

BY THE COURT:—

The motion of Petitioner-Appellant for leave to file its petition for rehearing, and in the alternative, to vacate

its judgment, in case No. 16780 and in the alternative to investigate, hear and determine allegations of fraud and conspiracy relating to the said judgment and the judgment of the District Court for the Eastern District of Texas in C.A. No. 2363 is GRANTED.

The Clerk is directed to file the said Petition.

It is further ordered that this Court will withhold consideration of this motion until the Petitioner-Appellant shall have filed with the Clerk of this Court a statement showing what issues, if any, which the Petitioner-Appellant now seeks to have this Court resolve are either not now pending in the United States District Court for the Southern District of Texas, cannot by proper procedural steps be brought in issue in that court, or cannot be litigated in some other appropriate district court, whether under Rule 60(b), by collateral attack, or otherwise; it being the opinion of this Court that, to the extent possible, without unduly delaying an adequate and full inquiry, all fact issues raised by this Petition and the Responses filed by the Respondent should be presented for initial resolution by a trial court.

The Petitioner shall file its statement within twenty (20) days from the date of this order; thereupon the Respondent shall have twenty (20) days to reply to such statement.

The statement and reply shall then be submitted to this panel of the Court for further disposition.

APPENDIX C-5

[1186] STATEMENT OF PETITIONER RE ALLEGED ALTERATIONS OF EXHIBIT D-31

(Caption Omitted)

(Filed April 1, 1969)

To The Honorable Judge Of Said Court:

Pursuant to the Order of the Honorable Ben C. Connally, Chief Judge, United States District Court for the Southern District of Texas under date of March 27, 1969, Petitioner Kinnear-Weed Corporation herewith files this written statement with the Clerk of this Court. The Court will no doubt notice that the allegations set out more completely below are in some ways different from the Petitioner's Statement of Contentions which was filed on February 13, 1969, pursuant to the Court's letter of February 5, 1969. The variation is the necessary product of the partial examination which Petitioner was allowed to conduct in the offices of the District Clerk on February 20, 1969.

GENERAL CONFIGURATION

Petitioner's allegations of fraud on the Trial Court, in this cause, are based on the following contentions that:

(a) Respondent altered a Hughes 1910 tri-cone rock bit, or,

(b) Respondent introduced into evidence in the original trial of C. A. 2363 as a Hughes 1910 tri-cone rock bit some other specious bit that was not in fact a Hughes 1910-1911 tri-cone rock bit.

Petitioner's allegations of fraud are based upon the obviously unusual physical configuration, condition and markings of the D-31 bit apparent on its face. It [1187] is well known in the drilling industry that no practical cone-type rock bit achieved successful penetration in any earth formation prior to the 1940's without having fluid course bores so incorporated that the pumped fluid impinged upon and thus cleansed the rolling cones.

It should be noted that, contrary to Respondent's expert witnesses' testimony in the original cause C.A. 2363, the cones of this D-31 bit interlocked with one another in a crowded-together fashion, rather than the 1/8″ or greater spacing (as Respondent's witness Scott testified during the trial of C.A. 2363). In addition to this unusual feature, the cones are mounted on the D-31 bit trunnion ears in a completely impractical manner not taught by any Hughes' patents of any date, Hughes' designs of any date, or Hughes' products of any date. Such an impractical mounting which results in the inside portion of the cone preceding all other cone portions (and thus absorbing direct formation pressure and friction) has never at any time functioned successfully, let alone efficiently.

It is readily apparent to Petitioner at this time that D-31, being a 9″ size rock bit, has oversized section trunnion ears and those certain portions and edges of the trunnion ears most susceptible to abuse from hard earth formations are not worn as much as other less susceptible portions of the bit.

The foregoing observations are sufficient in the mind of Petitioner to support the allegations that Respondent or its agents had modified the bit in question. The Feb-

ruary 20, 1969, examination in this Court and recent additional events appear to lend further credence and support to Petitioner's position that this D-31 bit is not today in its 1910-1911 original and unaltered condition: [1188] In the trial of C.A. 2363, Floyd Scott (Respondent's witness) positively identified (see Transcript of Trial, Volume IX, p. 2494, lines 18-20) this D-31 bit as constructed from "old drawings made by Brown Sharpe Mfg. Co.", and, (at lines 22-23), was made "in 1911, according to our ledger."

Petitioner has recently asked Hughes Tool Company and Brown & Sharpe Mfg. Co. to produce any drawings definitely establishing the date of manufacture and the name of the manufacturer of this D-31 bit.

When Petitioner's expert examined the D-31 bit on February 20, 1969, he noticed that the fluid course bores were not only machined at a later date than the rest of the trunnion ears (and later than the last field run of the D-31 bit) but, also, that the secondary machining had left fresh machining tool marks on the walls of these bores. It is obvious from the condition of these walls that little, if any, fluid (let alone an abrasive oil well drilling mud) has been pumped through the fluid course bores.

The Petitioner's expert also uncovered two other very significant flaws within the fluid course bores which flaws render ridiculous any claim of Respondent or Hughes Tool Company that this D-31 bit cone-type rock bit saw field drilling (or even extensive lab test drilling useage). The secondary machining of the D-31 bit was not only a crude operation it was also very poorly inspected. Within two of the three fluid course bores very glaring flaws exist, which were caused by the intersection of the new

remachined bores with original cavities within the bit. These other cavities were originally drilled to receive dowel pins which hold the three 120° trunnion ears segments together. No draftsman, let alone, a designing mechanical engineer, would design the D-31 bit or any [1189] other bit so that such gross cavity flaws could possibly result in a fluid course bores. Even in bits of the 1910-1911 period cavity flaws such as in the D-31 bit, would cause such extreme mud fluid turbulence that the trunnion ears and basic bit structure would be quickly eroded away with great danger of losing the bit and causing considerable damage. When these fluid course bores were freshly machined the cavity intersection flaws would have been evident, not only in a routine plant inspection, they also would have justified immediate rejection by any driller. Petitioner's expert emphasizes that the edges of the intersecting cavities are still very sharp and, hence, could not have experienced much cavitation type erosion wear as would be the case if any significant volume of abrasive oil well mud fluid had been pumped through these fluid course bores.

ALTERATION

Based upon the information presently available, it is our contention that the D-31 bit was altered in one or all of the following regards; and in the manner suggested:

1. The original fluid course bores were filled up with weld metal and new fluid course bores were milled in a different direction so as to direct the fluid stream away from and off of the roller cones. This milling operation appears to have been performed by a horizontal milling machine.

2. The original fluid course bores were absorbed within larger fluid course bores that were milled at such angles to the original bores that all fluid stream was directed away from and off of the roller cones. The same type milling machine could [1190] have been used on this type alteration.

3. The lower, angled inner faces of the original trunnion ears could have been milled at a smaller angle to the horizontal (well bottom) which resulted in the unusual present cone mounting attack angle. This operation could also have been performed on a horizontal milling machine.

4. In our anticipation of a forthcoming inspection of the disassembled D-31 bit we intend to direct several inquiries to previously obscured features of possible alterations of the cones, the cone spindles, lubrication holes, retaining rings, wear rings and wear rings meeting portions (lower faces) of the trunnion ears. Petitioner respectfully reserves the right to set out more specifically the contended alterations in this previously obscured portion of the D-31 bit.

5. One of several types of foundation bits may have been machined to display the jet drilling technique by:

(a) removal of the nozzle pipe lining in a previously existing water course so that the larger course remaining would play directly on the floor of the hole, or,

(b) a bit with solid trunnion ears may have had water courses for the first time drilled through it, so as to direct the water courses upon the floor of the hole.

[1191] SUPPORTING TESTIMONY

The significance of the present controversy surrounding the introduction of D-31 at the trial of C.A. 2363 is that this bit provided the most substantial support for the Respondent's claims of "no invention" in the Kinnear bit.

In an attempt to demonstrate the positioning of the water courses for jet drilling purposes in a prior bit, the testimony during the trial in C.A. 2363 suggests that D-31 was identified from "old drawings":

> "A. Yes, we looked up the old drawings made by Brown & Sharpe Mfg. Co and we could identify it from those." (Testimony of witness Floyd Scott, Transcript of Trial, Volume IX, p. 2494, line 18).

Regrettably, neither Brown & Sharpe Mfg. Co. nor Hughes Tool Company can now produce any such drawings.

It is the Petitioner's further contention, independent of any alterations of the Hughes 1910 tri-cone rock bit, that the Exhibit D-31 is not, and cannot be, attributed to any drawings of that period. Both Brown & Sharpe Mfg. Co. and Hughes Tool Company have failed to provide, or promise to provide, any such drawings, and in fact now contend that none exist. The D-31 bit itself fails to read in any plausible manner upon the patents and drawings of the Hughes 1910 tri-cone rock bit, and it is Petitioner's contention that the testimony which supported the introduction of this D-31 bit in the trial of C.A. 2363, the testimony which described this bit, D-31, to be a 1910 bit, was a fraudulent and wilful mischaracterization of this bit for the purpose of anti-dating the Kinnear bit, and establishing the prior art (relative to the water courses) in a pre-existing bit.

Filed with the Clerk of the United States District Court for the [1192] Southern District of Texas on this the 1st day of April, 1969.

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CERTIFICATE OF SERVICE (Omitted)